Supreme Court, U.S.
FILED

06-863 DEC 20 2006

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), this Court concluded that Washington's Grandparent Visitation Statute unconstitutionally infringed a fit parent's federal constitutional right to direct the care and upbringing of his or her children. Left expressly unanswered by the plurality opinion in *Troxel*, *id.* at 73, the question presented in this case is:

Whether the Fourteenth Amendment's Due Process Clause is violated when a court orders grandparent visitation over a fit parent's objection, where the grandparent has not proved by clear and convincing evidence that such an order is necessary to prevent harm or potential harm to the child.

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OPINIONS BELOW

The decision of the Pennsylvania Supreme Court (App., *infra*, 1a-52a) is reported at 904 A.2d 875 (2006). The decision of the Pennsylvania Superior Court (App., *infra*, 53a–64a) is reported at 851 A.2d 193 (2004). The decision and order of the Court of Common Pleas (App., *infra*, 65a-86a) are unreported.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on August 22, 2006. On November 13, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 20, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania's statute governing state-court orders of partial child custody or child visitation to a deceased parent's own parents or grandparents, 23 Pa. C.S. § 5311, provides:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

STATEMENT

Each of the fifty States allows grandparents to seek court-ordered visitation with their grandchildren and thereby obtain judicial review of even a fit parent's decision to deny or limit visitation. See App., *infra*, 87a-108a. State courts of last resort are deeply divided as to whether a fit parent's federal constitutional right to make decisions regarding the care, custody, and control of his or her child requires that a grandparent demonstrate actual or potential harm to the child before a court may order custody or visitation over the parent's objection.

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), seven Justices recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 68 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Justice O'Connor's plurality opinion—joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer—concluded that the State of Washington's Grandparent Visitation Statute was unconstitutional as applied to override a fit mother's decision to limit her daughter's paternal grandparents to monthly visits with the child following the father's suicide. *Id.* at 60-61, 73. The plurality noted the "sweeping breadth" of the Washington

statute, *id.* at 73, and the failure of the Washington courts to accord "special weight" to the mother's decision and to apply "the traditional presumption that a fit parent will act in the best interest of his or her child," *id.* at 69. The plurality expressly left unanswered "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73.

Justice Souter concurred in the judgment. He reasoned that the Washington statute was facially unconstitutional because it authorized "'any person' at 'any time' to petition and receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." *Troxel*, 530 U.S. at 76-77. Justice Thomas also concurred in the judgment, agreeing that "this Court's recognition of a fundamental right of parents to direct the upbringing of their child resolves this case." *Id.* at 80. Justice Thomas explained that strict scrutiny should apply to the custody order, concluding that "Washington lacks even a legitimate state interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Ibid.*[1]

The federal constitutional question left unanswered by *Troxel* continues to divide the States. As detailed below

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[1] Justices Stevens, Scalia, and Kennedy dissented in separate opinions. Noting that the Washington Supreme Court had found the state statute facially unconstitutional, Justice Stevens would have remanded for further review on the ground that the statute could have a "plainly legitimate sweep" despite applying to "any person" petitioning at "any time" and not requiring a showing of actual or potential harm in every case. *Troxel*, 530 U.S. at 85. Justice Kennedy dissented along similar lines, writing that he would remand for further review the state court's facial invalidation of state law because the best-interests-of-the-child standard might be appropriate in some third-party visitation cases. *Id.* at 94. Justice Scalia argued that the right of parents to direct the upbringing of their children is an unenumerated right not enforceable by "[j]udicial vindication." *Id.* at 91-92.

(*infra* pp. 11-21), twelve States prohibit courts from ordering grandparent visitation absent a showing of actual or imminent emotional or physical harm to the health or welfare of the child, whereas eleven States permit court-ordered custody or visitation, over a fit parent's objection, without requiring such a showing. See also App., *infra*, 87a-110a.

That conflict has important implications for a fit parent's fundamental right to make childrearing decisions. In jurisdictions where the Due Process Clause is read to require a showing of harm, the parent-child relationship remains free from state interference unless a court is satisfied that intervention is necessary because "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm." *Roth* v. *Weston*, 789 A.2d 431, 445 (Conn. 2002). In those States, "[t]he fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003).

In States where grandparents need not demonstrate any risk of harm to the child to gain court-ordered custody or visitation, a judge may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's "best interests." See, *e.g.*, *Brandon L.* v. *Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (upholding a visitation order "in the best interest of the children and [that] will not substantially interfere with the parent-child relationship"). In stark contrast to the "harm to the child" standard, the "best interests" standard sets a relatively low and notoriously vague bar. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate).

In the decision below, the Pennsylvania Supreme Court did not require a showing of actual or potential harm to the child before ordering, over the fit parent's objection, that a grandparent was entitled to take overnight custody of a child for one weekend a month and one week each summer. App., *infra*, at 25a-26a. While recognizing that a number of its sister States hold that the Due Process Clause requires such a showing, *id.* at 22a-23a & n.21, the Pennsylvania Supreme Court noted that the *Troxel* Court "refused to determine" the question, *id.* at 22a, and therefore held that the federal Constitution did not require a grandparent to demonstrate that court-ordered partial custody is necessary to avoid harm to the child.

A. The Trial Court Proceedings

Kaelen Fausey, the only son of Shane and Stephanie Fausey, was born on October 5, 1994, and lived with both of his parents. Stephanie Fausey died of cancer on May 25, 2002, leaving petitioner, Shane Fausey, as Kaelen's sole parent and guardian. At trial, the parties stipulated to petitioner's fitness as a parent. R. 149a-150a.[2]

After Ms. Fausey's death, a dispute arose between petitioner and respondent, Kaelen's maternal grandmother, regarding the frequency and length of her visits with Kaelen. Respondent filed a petition for partial custody over Kaelen on February 28, 2003, in the Court of Common Pleas for Lycoming County, Pennsylvania. R. 1a. Petitioner opposed the petition, arguing that he had made an appropriate decision regarding the amount and nature of grandparent visitation to allow, and that it was not permissible for a court to override a fit parent's decision regarding the amount and nature of grandparent visitation to allow in the absence of any proof or

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[2] References to the record excerpts reproduced in the Pennsylvania Supreme Court are designated by an "R."

allegation of actual or imminent physical or emotional harm to the child. See R. 5a-10a.

On April 10, 2003, following an off-the-record conference, a custody conference officer issued a temporary order granting respondent unsupervised partial custody of Kaelen for one weekend a month, one week during the summer, and two hours on Christmas Day. R. 4a-5a.[3] Petitioner objected to respondent's having overnight custody of Kaelen, and a trial date was set. R. 5a. Petitioner filed a petition to modify the temporary order, citing concerns about respondent's past alcohol abuse, history of household domestic violence, inadequate supervision of Kaelen, and her husband's medical history. R. 6a-7a. Relying on *Troxel*, petitioner also claimed that the temporary order violated his fundamental right to make childrearing decisions under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. R. 7a-8a.

In July 2003, the Court of Common Pleas held a trial. Petitioner testified that, while willing to agree to unsupervised visitation one day each month and two hours on Christmas (R. 40a-42a, 210a-211a), more extensive visitation—especially overnight—was not in Kaelen's best interest. Petitioner testified that, prior to her death, Kaelen's mother agreed that unsupervised, overnight visits with respondent were unacceptable. R. 178a. Petitioner explained to the court that his concerns regarding respondent's unsupervised, overnight visitation were based, in part, on past instances of domestic violence in respondent's home and concern about the level of supervision and care Kaelen received while with respondent.

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[3] Pennsylvania law distinguishes the term "partial custody" from the term "visitation." A party granted visitation may not remove the child from the parent's control, whereas a party granted custody can remove the child from the parent's control. As the Pennsylvania Supreme Court indicated, the Court in *Troxel* and most other States use the term "visitation" to refer to both kinds of court orders. App., *infra*, at 4 n.4

R. 42a-51a, 179a-181a. Respondent neither alleged nor proved at trial that Kaelen would suffer any physical or emotional harm if petitioner were allowed to decide, free from judicial interference, the amount and nature of grandparent visitation to allow.

On August 1, 2003, petitioner's objections notwithstanding, the court issued an order granting respondent visitation for one overnight weekend each month and one week each summer. App., *infra*, 85a-86a. The court found that respondent "met her burden of proof that it is in the child's best interest to have some time with the grandparent" and that court-ordered partial custody would be in Kaelen's best interests. R. 232a.

Petitioner appealed the trial court's order, again asserting that the order violated his fundamental right to raise his child without undue governmental interference, as protected by the Due Process Clause in accordance with *Troxel*. In an October 16, 2003, opinion explaining the basis for his order, the trial judge addressed petitioner's constitutional claims. App., *infra*, at 65a-84a. Noting that *Troxel* did not resolve what particular standards should apply to grandparent visitation statutes, *id.* at 75a, the trial court held that "Pennsylvania has a strong interest in protecting children like Kaelen from bad decisions made by parents," *id.* at 81a, and therefore the statute would survive judicial review even under a strict scrutiny analysis, *id.* at 78a-79a. The trial court found that the Pennsylvania statute "strikes a perfect balance between arbitrary interference with the rights of parents and the State's interest in promoting grandparent/grandchild contact." *Id.* at 81a. The statute survived strict scrutiny as applied in petitioner's case because respondent's showing of "the benefit of visitation" was sufficient to defeat the "presumption that a fit parent's decision is in the best interest of the child." *Ibid.*

B. The Pennsylvania Superior Court Decision

Petitioner timely appealed the trial court's order, continuing to argue that the visitation order unconstitutionally infringed his fundamental right to make childrearing decisions under the Fourteenth Amendment's Due Process Clause.[4] App., *infra*, 53a-55a. The Pennsylvania Superior Court applied strict scrutiny, *id.* at 56a, and held that petitioner's fundamental rights were adequately protected because respondent demonstrated that grandparent visitation "would be in Kaelen's best interest" and "would not interfere with the parent-child relationship," notwithstanding "the presumption that [petitioner's] decisions regarding Kaelen's visits with grandmother were in Kaelen's best interest." *Id.* at 63a. The court held that section 5311 did not violate petitioner's due process rights as applied by the trial court's custody order. *Id.* at 64a.

C. The Pennsylvania Supreme Court Decision

The Pennsylvania Supreme Court granted allocatur to determine the constitutionality of court-ordered grandparent visitation upon the death of the child's parent who is also the grandparent's child. App., *infra*, 1a. The court noted that this issue was one issue of first impression, having been left unanswered by *Troxel*. *Id.* at 8a (citing 530 U.S. at 73).

The court observed that the facts of *Troxel* were similar to those in this case—each involving the death of a parent and the surviving parent's decision to restrict visitation between

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[4] Petitioner also challenged the application of section 5311 on Equal Protection Clause grounds, arguing that the statute treated a surviving parent after the other parent's death differently than two living parents for grandparent visitation purposes without a sufficient governmental interest. App., *infra*, 55a. The Pennsylvania Superior Court rejected Petitioner's equal protection challenge, *id.* at 61a-62a, and Petitioner did not press that argument on appeal before the Pennsylvania Supreme Court, *id.* at 7a.

the child and a grandparent on the deceased parent's side. App., *infra*, 9a. The majority opinion characterized the *Troxel* plurality as focused on the "breathtakingly broad" statute at issue there and on the Washington courts' failure to presume that a fit parent acts in the best interests of the child. *Id.* at 10a. "[D]irectly relevant to the case" at bar, the Pennsylvania Supreme Court wrote, "the [*Troxel*] plurality refused to 'consider the primary constitutional question * * * whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.'" *Id.* at 10a-11a (quoting *Troxel*, 530 U.S. at 73).

Turning to that "primary constitutional question," the court recognized that "the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause," App., *infra*, 16a-17a (citing *Troxel*, 530 U.S. at 67), and concluded that any state infringement of that right must serve a compelling state interest and be narrowly tailored to effectuate that interest, *id.* at 17a. Identifying a compelling state interest in protecting the health and emotional welfare of children, the court considered whether the application of section 5311 here was narrowly tailored to serve that interest. App., *infra*, 20a. The court acknowledged the deep divide among state courts of last resort as to whether the Due Process Clause requires a court to find harm or potential harm to the child before ordering grandparent visitation over a fit parent's objection. See *id.* at 22a-24a. "[W]hile some of our sister States have required a finding of harm," the court noted, "a number of courts have either declined to require third parties to demonstrate harm or have found that grandparents may satisfy a requirement of harm merely by showing that the child will be harmed by the termination of a beneficial relationship with his or her grandparents." *Ibid.*

The court held that the text of section 5311 "did not require a specific finding of harm" and that Pennsylvania

precedent "militate[d] against requiring grandparents to demonstrate harm as a condition precedent to a grant of visitation." App., *infra*, 24a. The court further concluded that section 5311 did not violate the federal Constitution as applied here, despite the fact that there neither was nor could be any finding that the denial of additional grandparent visitation had caused or threatened to cause emotional or physical harm to the health or welfare of the child. See *id.* at 25a-26a.

Justice Newman concurred, urging that "it is time to regard the best interests of the child as a fundamental and momentous right," App., *infra*, 26a, and that "[t]he fundamental rights of children to have their best interests considered prevails over the fundamental rights of parents to the care, custody, and control of their children," *id.* at 37a. Noting that "Great Britain has come to terms with the fundamental rights of children," *id.* at 38a, Justice Newman "advocate[d] that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right," *ibid.*

Chief Justice Cappy dissented, arguing that section 5311 was unconstitutional as applied, because "unless a court finds that a fit parent's decisions regarding a child's contact with a grandparent [are] causing or will cause harm to the child, the state's interest in protecting the child is not implicated." App., *infra*, 50a. He would have held that "[t]he state simply has no compelling interest to interfere with a fit parent's fundamental right to make decisions regarding a child's contact with a grandparent simply because the grandparent, or anyone else, including a state court, thinks that a different decision is better or more desirable for the child." *Id.* at 51a (citing *Troxel*, 530 U.S. at 72-73). Chief Justice Cappy would have required respondent "to demonstrate, by clear and convincing evidence, that absent an order granting the grandparent custody and/or visitation, the child is being or will be harmed." *Id.* at 51a-52a.

* * *

This case turns on the question left unanswered in *Troxel*: whether, as a condition precedent to court-ordered visitation, the Fourteenth Amendment's Due Process Clause requires grandparents to show that a fit parent's denial or limit of visitation risks harm or potential harm to the child. Recognizing a deep split among state courts of last resort on this issue, Pennsylvania joined those States holding that a grandparent need not demonstrate harm.

REASONS FOR GRANTING THE PETITION

I. The States Are Deeply Divided As To Whether A Fit Parent's Fundamental Right Under the Due Process Clause Of The Fourteenth Amendment Requires That A Grandparent Seeking Court-Ordered Visitation Over The Parent's Objection Must Demonstrate That Visitation Is Necessary To Avoid Harm To The Child

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), a majority of this Court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 65 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). A plurality of the Court in *Troxel* determined that the Washington Grandparent Visitation Statute was unconstitutional as applied where a court awarded visitation rights to a child's paternal grandparents over the fit mother's objection. *Id.* at 75.

Justice O'Connor, writing for the plurality, took issue with the Washington trial court's failure to accord "special weight" to the mother's "determination of her daughter's best interest," and the court's failure to apply "the traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69. Justice O'Connor emphasized that "the Due Process Clause does not permit a

State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73. Justice Souter and Justice Thomas wrote separate opinions concurring in the judgment. See *supra*, p. 3.

The States are deeply divided on the question expressly left unanswered by the *Troxel* plurality: "whether the Due Process Clause requires" that all grandparent visitation statutes must "include a showing of harm or potential harm as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Nine states courts of last resort have answered that question in the affirmative, and three more have established the same rule by statute in response to *Troxel*. See *infra*, pp. 12-17. Eleven States have reached the opposite conclusion. See *infra*, pp. 18-19.

A. Twelve States Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Twelve States prohibit court-ordered visitation over a fit parent's objection absent a showing that denial of visitation would result in actual or potential harm to the child. In nine of those jurisdictions, the highest court of the State has interpreted the Fourteenth Amendment's Due Process Clause to require harm as a threshold showing, without which court-ordered visitation is impermissible. *Linder* v. *Linder*, 72 S.W.3d 841 (Ark. 2002); *Roth* v. *Weston*, 789 A.2d 431 (Conn. 2002); *Brooks* v. *Parkerson*, 454 S.E.2d 769 (Ga. 1995); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003); *Williams* v. *Williams*, 501 S.E.2d 417 (Va. 1998); *In re Parentage of C.A.M.A.*, 109 P.3d 405 (Wash.

2005).[5] At least three States, in response to *Troxel*, have imposed a harm-based standard by statute to remedy federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006).

The highest courts in those states have held that any lesser standard—requiring, for example, that the grandparent demonstrate merely that visitation would be in the best interests of the child—would afford inadequate "special weight" to the fit parent's determination of what is best for the child. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("There is nothing in [the best interest standard] * * * that mandates the judge to give special weight to the parents' decision.").[6] Less

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[5] In at least four other States, including Maine, Mississippi, South Carolina, and Vermont, courts have declined to declare potential harm to the child to be the *sole* justification for state intervention, but they have held that only sufficiently "compelling" or "urgent" circumstances, such as harm to the child, will overcome the presumption in favor of the fit parent. *Rideout* v. *Riendeau*, 761 A.2d 291, 301 (Me. 2000) ("The natural right of a parent to the care and control of a child should be limited only for the most *urgent reasons.*") (quoting *Merchant* v. *Bussell*, 27 A.2d 816, 818 (Me. 1942)); *Stacy* v. *Ross*, 798 So. 2d 1275 (Miss. 2001) ("[F]orced, extensive, unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents."); *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003) ("The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing *compelling circumstances*, such as significant harm to the child, if visitation is not granted.") (emphasis added); *Glidden* v. *Conley*, 820 A.2d 197 (Vt. 2003) (holding that a mere "best interests" standard does not survive *Troxel* and requiring "evidence of compelling circumstances to justify judicial interference with the parent's visitation decision").

[6] The Iowa Supreme Court acknowledged that harm may result "[w]hen a grandparent has established a substantial relationship with a grandchild" and that emotional bond is severed, but held that the harm must be "beyond that derived from the loss of a helpful, beneficial

compelling circumstances, those courts have explained, cannot justify "state intrusion on the [fit] parent's fundamental right" to make independent childrearing decisions. *Linder*, 72 S.W.3d at 858; see also *Howard*, 661 N.W.2d at 188. The Connecticut Supreme Court, for example, determined that "the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody [of the child] * * * namely, that the child is neglected, uncared-for or dependent as those terms have been defined [by state statute]." *Roth*, 789 A.2d at 445 (internal quotation marks omitted). The Massachusetts Supreme Judicial Court similarly held that grandparents seeking visitation must "allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *Blixt*, 774 N.E.2d at 1060.[7] The Virginia Supreme Court has even specified that harm to the "child's health or welfare" must be *actual* and not merely potential or likely. *Williams*, 501 S.E.2d at 418.

Those jurisdictions reject the notion that judicial intervention into a fit parent's childrearing decisions may be justified where a grandparent demonstrates merely that court-ordered visitation would be in the child's best interests. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("The best interest standard is a doctrine that embraces the interests of children, and we have

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influence of grandparents." *Howard*, 661 N.W.2d at 191. The court suggested that a "substantial relationship" would be that "akin to a parental relationship." *Ibid.*

[7] The Massachusetts court suggested that disturbing a "child's preexisting relationship with a nonbiological parent" might itself constitute harm, *Blixt* 774 N.E.2d at 1060, but state appellate courts have applied that holding to define more precisely the circumstances under which children are harmed, see, *e.g.*, *Dearborn* v. *Deausault*, 808 N.E.2d 1253, 1256 (Mass. Ct. App. 2004) (holding that a relationship in which a grandparent saw a child several times per month was "not the kind of relationship from which significant harm to the children may be inferred from disruption alone").

never interpreted it to protect the fundamental parenting interest or to provide a presumption for fit parents."). As the South Carolina Supreme Court reasoned: "The fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn*, 586 S.E.2d at 568. That is, proof that visitation would satisfy a judge's opinion of a child's "best interests" cannot overcome the "presumption that a fit parent's decision is in the best interest of the child." *Ibid.*

The New Jersey Supreme Court similarly held that a "best interests" standard fails to respect a parent's due process rights because "the avoidance of harm to the child" is "the only state interest warranting invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent." *Moriarty*, 827 A.2d at 222-223;[8] see also *C.A.M.A.*, 109 P.3d at 410 ("'[T]he standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'") (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998)). In sum, those state high courts have determined that only proof that grandparent visitation is truly necessary to avoid harm—and not merely to incrementally benefit the child's wellbeing—adequately protects parents' fundamental rights from state intervention. See *Camburn*, 586 S.E.2d at 568.

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[8] The New Jersey Supreme Court acknowledged that "the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm." *Moriarty*, 827 A.2d at 224. State appellate courts have subsequently focused on the need for evidence of actual physical, mental, or emotional suffering and have interpreted the standard set forth in *Moriarty* to require more than the "loss of potentially happy memories." *Mizrahi* v. *Cannon*, 867 A.2d 490, 498 (N.J. Super. Ct. App. Div. 2005).

State legislatures also have read *Troxel* to require that grandparents prove that denial of visitation will result in harm to the child where a fit parent objects to visitation. The Texas Legislature amended the State's grandparent visitation statute to provide that courts may order visitation *only* where the grandparent "overcomes the presumption that a parent acts in the best interest of the parent's child by proving * * * that denial of possession of or access to the child would *significantly impair the child's physical health or emotional well-being*." Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) (emphasis added); see also H. 79, Tex. B. Analysis, H.B. 261, Reg. Sess. (Tex. 2005) (explaining that the bill "[i]ncorporates the holding in *Troxel* v. *Granville*, 530 US 57 (2000)"); Tex. Att'y Gen. Op. No. GA-0260, 2004 WL 2326558, at *11 (Oct. 13, 2004) (recommending that, "to avoid an unconstitutional application of the [Texas grandparent visitation] statute" following *Troxel,* courts must require grandparents to prove that "denial of access by the grandparent would significantly impair the child's physical health or emotional wellbeing").

Likewise, the Illinois legislature amended its visitation statute in the wake of *Troxel* to require that grandparents demonstrate harm to the child before courts may order visitation rights over the decision of a fit parent. The House sponsor of the bill noted that the State's previous visitation statute "was too lenient" and had been invalidated in a series of decisions by the Illinois Supreme Court in light of *Troxel.*[9] Ill. H. Trans., H. 93-110, Reg. Sess., at 80 (2004). The new

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[9] Immediately following *Troxel*, the Supreme Court of Illinois sustained an as-applied challenge to the statutory provision that allowed grandparents to petition for court-ordered visitation over the objection of both parents. *Lulay* v. *Lulay*, 739 N.E.2d 521 (2000). In 2002, it held those statutory provisions *facially* unconstitutional because they failed to incorporate a presumption that fit parents acted in the best interests of their children. *Wickham* v. *Byrne*, 769 N.E.2d 1 (2002).

statute was "written with [those] Supreme Court decision[s] in mind" and, accordingly, replaced the "best interest of the child" standard with a "harm to the child" standard. Ill. S. Trans., S. 93-109, Reg. Sess. (2004). The amended statute specifies that "[t]he burden is on the [grandparent] * * * to prove that the parent's actions and decisions regarding visitation times are *harmful to the child's mental, physical, or emotional health*." 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) (emphasis added).

The Michigan legislature also adopted a grandparent visitation statute containing a harm-based standard, Mich. Comp. Laws § 722.27b(4)(b) (2006), after the Michigan Supreme Court held the previous statute unconstitutional in the wake of *Troxel*. See *DeRose* v. *DeRose*, 666 N.W.2d 636 (Mich. 2003). The new statute codifies *Troxel*'s "presumption that fit parents act in the best interests of their children" by requiring that a grandparent prove that a parent's decision to deny visitation creates "a substantial risk of harm to the child." Mich. S. Fiscal Agency B. Analysis, S. 92, Reg. Sess. (2005) (presenting the legislative history of the amended Child Custody Act).

B. Eleven States Do Not Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Pennsylvania joins the highest courts of ten other States that permit courts to order grandparent visitation even absent a judicial determination that visitation is necessary to avoid harm to the child. Those courts reject the proposition that the federal Due Process Clause precludes court-ordered visitation to grandparents unless the child has been, or is likely to be, harmed by the lack of visitation. Moreover, some of those courts have decided that placing the burden on the grandparent to prove that visitation would be beneficial to the child sufficiently accounts for the "special weight" that *Troxel*

requires be accorded to parental preferences. See, *e.g.*, *Evans* v. *McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004) ("[The] special weight [that] must be given to a fit parent's determination as to the desirability of visitation with [grandparents] * * * can be accomplished by imposing on the [grandparent] the burden of proving that visitation by the [grandparent] is in the best interests of the child and by requiring that this be established by clear and convincing evidence.").

The highest courts in these States consider only whether visitation is in the "best interests" of the child. The courts typically make that determination by resorting to common-law or statutory multi-factor tests that do not require a showing of harm to the child. See *Evans*, 88 P.3d at 1096 ("best interests" standard sufficiently accounts for the "special weight" that must be given to fit parents' decisions); *In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (upholding a "best interest" standard in light of *Troxel*); *In re Adoption of C.A.*, 137 P.3d 318, 325 (Colo. 2006) (upholding a statutory "best interests" standard, because "*Troxel* did not require a standard of significant or substantial emotional harm to the child"); *Thomas* v. *Nichols-Jones*, 2006 Del. Lexis 515, *4-*5 (Del. 2006) (upholding application of best interests standard in light of *Troxel* where grandparent bears the burden of proof); *State* v. *Paillet*, 16 P.3d 962, 971 (Kan. 2001) (*Troxel* did not "call[] into question" a statutory standard permitting court-ordered visitation where there has been no finding of potential harm to the child); *Blakely* v. *Blakely*, 83 S.W.3d 537, 543 (Mo. 2002) (upholding a statutory "best interests" standard, because *Troxel* does not "require[] courts to find unconstitutional on its face any statute granting grandparents visitation in the absence of a finding that the lack of such visitation will cause the child harm"); *Hamit* v. *Hamit*, 715 N.W.2d 512, 528 (Neb. 2004) (the statutory "best interests" standard survives *Troxel*); *Harrold* v. *Collier*, 836 N.E.2d 1165, 1172 (Ohio 2005)

(upholding a multi-factor statutory "best interest" test and denying that *Troxel* requires a higher threshold showing); *Currey* v. *Currey*, 650 N.W.2d 273, 278-79 (S.D. 2002) (considering the effect of *Troxel* and applying a statutory "best interests" standard); *Brandon L.* v. *Moats*, 551 S.E.2d 674, 685 (W.Va. 2001) (upholding a statutory "best interests" standard in light of *Troxel*).

C. The Widespread Uncertainty Regarding The Circumstances Under Which A Court May Interfere With A Fit Parent's Constitutional Rights Requires This Court's Intervention

All fifty States have some kind of third-party visitation statute, and all continue to wrestle with the application of those statutes in light of *Troxel*. See App., *infra* at 87a-110a. The existing conflict shows no sign of abating, and "[t]he * * * years since *Troxel* have made abundantly clear that its narrow holding has done much to muddy the jurisprudential waters with regard to visitation." Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. Contemp. Legal Issues 347, 351 (2003). Indeed, in the wake of *Troxel*, twenty-eight state supreme courts have confronted whether the Fourteenth Amendment requires that those statutes incorporate a harm threshold. See App., *infra*, at 87a-101a.[10]

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[10] Of those States whose highest courts have not ruled since *Troxel* as to whether the Fourteenth Amendment mandates a harm requirement, two have pre-*Troxel* precedent requiring a showing of harm. Eight States have no published case law squarely addressing the federal constitutional question. In another nine States, intermediate appellate courts are the highest authority to rule. See *Dodd* v. *Burleson*, 932 So. 2d 912, 920 (Ala. Civ. App. 2005); *McGovern* v. *McGovern*, 33 P.3d 506, 511-512 (Ariz. Ct. App. 2001); *McCune* v. *Frey*, 783 N.E.2d 752, 756 (Ind. App. 2003); *Vibbert* v. *Vibbert*, 144 S.W.3d 292, 294-295 (Ky. Ct. App. 2004); *Galjour* v. *Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001); *Koshiko* v. *Hanning*, 897 A.2d 866, 882 (Md. Ct. Spec. App.) cert. granted, 900 A.2d 751 (tbl.) (Md. 2006); *Ridenour* v. *Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995); *In re Paternity of*

Several state courts have complained that *Troxel* failed to provide sufficient guidance regarding the scope of the "fundamental" rights at stake. The Oregon Supreme Court, for example, found it "difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the State or a nonparent must make before a court may interfere with a parent's custody or control of a child." *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 730 & n.4 (Or. 2004) (citing *The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 219, 229 (2000) ("The plurality's failure to elaborate on the mechanics of the constitutional standard will leave judges, legislators, and individual litigants without adequate guidance.")). The Supreme Court of Michigan agreed, remarking that, post-*Troxel*, "federal constitutional law in this area is now not as predictable as it was before." *DeRose*, 666 N.W.2d at 643. It falls to this Court to provide much-needed predictability by issuing a clear directive to the States as to what the Constitution requires. Absent this Court's guidance, parents, children, and grandparents seeking visitation will continue to bear the expense and disruption of continued litigation.

Roger D.H., 641 N.W.2d 440, 445 (Wis. Ct. App. 2002). Without this Court's guidance, families in those States will be subject to the burden of further appellate litigation as the remaining state courts of last resort take up the unanswered question of *Troxel*. See App., *infra*, 99a-108a.

Three States have settled the matter on state constitutional grounds, finding that a parent's right to privacy under the state constitution independently requires a showing of harm. *Sullivan* v. *Sapp*, 866 So. 2d 28, 38 (Fla. 2004) (reading Fla. Const. art. 1, § 23 to prohibit "interven[tion] in parental decisionmaking absent significant harm to the child threatened by or resulting from those decisions"); *Neal* v. *Lee*, 14 P.3d 547, 550 (Okla. 2000) (holding that, while "after *Troxel*, it is unclear whether a showing of harm is necessary under the United States Constitution," harm remains a requirement under the Oklahoma Constitution); *Hawk* v. *Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (Tenn. Const. art. 1, § 8 forbids interference with parental rights "[a]bsent some harm to the child"). See App., *infra*, 99a, 104a, 106a.

II. The Pennsylvania Supreme Court's Decision Fails To Safeguard Parents' Fundamental Liberty Interest In The Care And Upbringing Of Their Children

"[T]he interest of parents in the care, custody, and control of their children * * * is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65 (plurality opinion). That is because, as the Connecticut Supreme Court put it, "[t]he family entity is the core foundation of modern civilization." *Roth*, 789 A.2d at 447. The family, like the child, "is not a mere creature of the state." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Rather, the family is an institution whose integrity the State must respect not just as sound public policy, but as a matter of right. While the role of the extended family in most children's upbringing cannot be ignored, this Court has recognized the unique and fundamental nature of the parent-child nucleus as being at the core of our concept of "family." See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) ("[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

This Court has long recognized "that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, *absent a powerful countervailing interest*, protection." *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (emphasis added) (quoting *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972)). That powerful interest cannot be simply one court's estimation of a child's "best interest," a notoriously vague standard. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate); see also Principles of the Law of Family Dissolution § 2.02 cmt. c (2002) ("[The best interests test] has long been criticized for its indeterminacy. To apply the test,

courts must often choose between specific values and views about childrearing. * * * When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts who have their own theories of what is good for children and what is effective parenting.").[11] The "best interests" baseline is more appropriate in mediating custody disputes between those whose existing rights to custody are of equal strength, such as divorcing parents. As the plurality recognized in *Troxel*:

> [S]o long as a parent *adequately cares for his or her children* (*i.e.*, is fit), there will normally be *no reason* for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

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[11] Indeed, the confusion among the States extends to the degree of proof necessary to meet the particular standard. Even some of those States that fail to impose a harm standard have instituted a higher burden to establish the child's best interests and implement the "special weight" required by *Troxel*. See, *e.g.*, *Leavitt* v. *Leavitt*, 132 P.3d 421, 426-427 (Idaho 2006) (requiring third parties to prove child's best interests by clear and convincing evidence); *Evans*, 88 P.3d at 1089 (same). But see, *e.g.*, *O'Donnell-Lamont*, 91 P.3d at 731 (applying a "preponderance of the evidence" standard in the best interests determination); *Brandon L.*, 551 S.E.2d at 685 (W. Va. 2001) (same). It is possible, of course, to adopt *both* a heightened burden of proof and a substantive standard requiring a showing of harm. See, *e.g.*, *In re R.A.*, 891 A.2d 564, 580 (N.H. 2005) (adopting a clear and convincing evidence standard); App., *infra*, 51a-52a (Cappy, C.J., dissenting).

In the instant case, the trial court found by a preponderance of the evidence that visitation by petitioners was in the child's best interest. App., *infra*, at 66a-67a; see also R. 228a-229a. Over petitioner's objection, the court below accepted the trial court's findings. See Pet. Br. 28-29; Pet. Reply Br. 7-8. In answering the substantive question of whether a showing of harm is constitutionally required, this Court can and should also provide the States with guidance regarding the burden of proof that is necessary to protect the constitutional right at issue.

Troxel, 530 U.S. at 68-69 (emphasis added).

Intrusion into this most intimate of spaces requires not merely a court's opinion that a child's situation is somehow suboptimal, but a specific and identifiable "showing [of] compelling circumstances, such as significant harm to the child, if visitation is not granted." *Camburn*, 586 S.E.2d at 568. The Pennsylvania Supreme Court's failure to require such a showing permits a court—typically a single judge—to abrogate a parent's fundamental right when it is of the opinion that the parent has made the wrong decision about the "best interests" of a child. As the Supreme Court of Wyoming put it, "[t]he constitutional protections afforded to parents are not reserved for those who are perfect." *In re Guardianship of MEO*, 138 P.3d 1145, 1159 (2006) (citing *Santovsky* v. *Kramer*, 455 U.S. 745, 753-754 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.")). The Pennsylvania Supreme Court's decision, however, enacts precisely such a standard of perfection—and the loss of a fundamental right is the penalty for missing the mark.

A harm requirement would also be consistent with this Court's determination of the scope of this fundamental right in other contexts. In *Pierce* v. *Society of Sisters*, this Court reasoned that "there [were] no peculiar circumstances or present emergencies which demand extraordinary measures" to deprive parents of the right to enroll their children in private schools whose activities were "not inherently harmful." 268 U.S. at 533. Similarly, in *Wisconsin* v. *Yoder*, this Court found it significant that it would cause no "harm to the physical or mental health of" Amish children to exempt them from the State's public educational requirements. 406 U.S. at 239.

Moreover, a standard that simply requires a grandparent to argue for a child's "best interests," without a threshold

showing of potential harm, would invite litigation—a process that is almost *never* in the best interests of the child. As at least five Justices in *Troxel* agreed, "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (plurality opinion) (quoting *id.* at 101 (Kennedy, J., dissenting)).

Parties to a dispute over childrearing almost always feel they have the child's best interests in mind. A malleable "best interests" standard encourages any grandparents dissatisfied with the level of interaction they currently have with a child to file suit in the hope that the judge they draw will agree that the child's situation could be made better through mandatory visitation. See *Rideout* v. *Riendeau*, 761 A.2d 291, 296 n.5 (Me. 2000) ("Broad room for debate [under a subjective "best interests" standard] means a broad and unpredictable array of possible outcomes in any custody contest. That fact encourages prolonged and expensive litigation and 'strategic behaviors' of the parents, neither of which usually benefits children."). A standard that requires a finding of harm limits litigation to cases in which a court's intervention is truly necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2006

APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

J-53-2005

CHERYL HILLER,

Appellee,

versus

SHANE FAUSEY

Appellant.

Appeal from the Order of the Superior Court entered on May 25, 2004 at No. 1428 MDA 2003, affirming the Order of the Court of Common Pleas of Lycoming County entered on August 1, 2003 at No. 03-20, 361. 851 A.2d 193 (Pa. Super. 2004) Argued: May 16, 2005

Before CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and BAER, JJ.

JUSTICE BAER.

This Court granted allocatur in this matter to determine the constitutionality of a trial court's application of the Pennsylvania's statute governing the provision of partial custody or visitation to grandparents upon the death of their

child who is also the grandchild's parent, 23 Pa.C.S. § 5311.[1] The Superior Court held that the trial court's application was constitutional. We affirm.

Shane Fausey (Father) has challenged the grant of partial custody of his son, Kaelen Fausey (Child), then age eight, to Cheryl Hiller, Child's maternal grandmother (Grandmother). Child lived with his mother (Mother) and Father from his birth in 1994 until his mother died in May 2002 after battling cancer for several years. Prior to Mother's death, Child had frequent contact with Grandmother, especially during the last two years of his mother's illness, when they saw each other on an almost daily basis. Grandmother often transported Child to and from school and cared for him when Mother attended doctors' appointments or was too ill to provide care. Further, Grandmother took on the task of preparing Child for Mother's death. The trial court found credible the testimony that Child and Grandmother enjoyed spending time together, showed a great deal of affection toward one another, and shared a very close relationship.

After Mother's death, however, Father abruptly denied Grandmother contact with Child, despite Grandmother's repeated attempts to call Father and request time with Child. Between Mother's death in May 2002 and April 2003,

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[1] § 5311. When parent deceased

If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S. § 5311.

Grandmother saw Child on only three occasions when Child was visiting other maternal relatives.[2]

Eventually exasperated with the situation, Grandmother filed for partial custody pursuant to Section 5311. The court granted her temporary partial custody in April 2003 following a non-record custody conference, after which Father filed for modification. After extensive pre-trial activities, the court held a two-day hearing in July 2003. At its conclusion, the trial court granted Grandmother partial custody one weekend per month and one week each summer.[3]

In its thorough opinion in support of its decision, the trial court explained its application of Section 5311. In compliance with the United States Supreme Court's decision in *Troxel v. Granville,* 530 U.S. 57 (2000), discussed in detail *infra,* the trial court applied the presumption that a fit parent acts in the child's best interests. Further, the court noted that a grandparent seeking to compel partial custody carries the burden of proof.

With these premises established, the trial court examined the facts of the case. As specifically required by Section 5311, the court first considered the contact between Child and Grandmother prior to Grandmother's petition. First, the court noted that Child's parents had permitted significant contact with Grandmother prior to Mother's death, and that a strong and affectionate relationship had formed between Child and Grandmother.

Next, in accordance with *Troxel,* the court considered the likelihood and amount of contact that Father would provide to Grandmother absent a court order. As previously discussed,

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[2] Father apparently allowed Child's relationship to continue with his maternal great-grandfather (Great-grandfather) with whom Child also had a very strong relationship.

[3] In its temporary custody order, the trial court had given Grandmother time on Christmas Day. In its final order, it omitted this provision, noting that Christmas is best spent with a parent.

Grandmother had seen Child only three times between May 2002 and April 2003. Moreover, according to the trial court, Father's position on acceptable partial custody or visitation changed dramatically during the course of the proceedings.[4] After one custody conference, Father agreed to limited periods of partial custody without overnight stays. One month later he changed his mind and asserted that Grandmother should not be provided any court-ordered visitation. Father changed his position yet again at trial, where he stated that he would permit partial custody one day per month without overnight stays. Parenthetically, the court also found Father's various accusations regarding his concern's for Child's safety in Grandmother's care lacking in credibility and devoid of evidentiary support: "Given the fact that none of these concerns have any merit, the court must conclude that either [Father] is grasping at straws and inventing reasons to keep [Child] away from his grandmother, or he actually believes the allegations, which shows he is under serious delusions concerning [Grandmother] and his judgment regarding her is polluted."[5] Tr. Ct. Slip Op. at 5. Accordingly, with ample

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[4] Although the parties and the courts below have occasionally used the terms interchangeably, we note that Pennsylvania law distinguishes "partial custody" from "visitation." *See* 23 Pa.C.S. § 5302. A party granted "visitation" may visit a child but may not remove the child from the parent's control. *Id.* Conversely, a grant of "partial custody," as in the case at bar, allows the individual to "take possession and control of the child" and can involve potentially extensive periods of time. *Id.* The United States Supreme Court in *Troxel* and many of the courts of our sister states have utilized the term "visitation" to encompass both visitation and partial custody as defined in Pennsylvania. Therefore, when discussing the *Troxel* decision and those of our sister courts, we will use the term "visitation" generically.

[5] The court supported its conclusion further, noting Father's similar treatment of Great-grandfather. The court noted:

> [Father's] own testimony demonstrated that he allows his personal feelings to cloud over his judgment regarding [Child's] contact with his family. For instance, all parties agreed that [Child] and [Great-grandfather] have an extremely close relationship, and in fact [Father] ensured the two remained in frequent contact after [Mother's] death. However, [Father] became perturbed at [Great-grandfather]

factual support, the trial court concluded that, absent a court order, Father would not provide Grandmother the opportunity to see Child.

The court then turned to the statute's requirement that the court find that visitation or partial custody with Grandmother would be in the child's best interests, even when applying the presumption that a parent's decision limiting contact is in the child's best interests. The court found that Father's proposed arrangement of one day per month "is not enough time to maintain the bond [Child] has established with his grandmother and her side of the family, especially given his extensive contact in the past." Tr. Ct. Slip Op. at 6. Specifically, the court noted that Grandmother is warm and loving and has developed a "longstanding, very close relationship" with Child, and that Child enjoyed spending time with her, engaging in many activities with her, and visiting with his many maternal relatives during the family gatherings that occur during the court-ordered periods of partial custody. Tr. Ct. Slip Op. at 6. Significantly, the court observed that "when [Child] is with [Grandmother], he seeks and receives emotional support regarding the death of his mother." Tr. Ct. Slip Op. at 6. This finding is particularly resonant because "[Father] himself expressed concerns regarding [Child's] ability to express his emotions regarding his mother's death." Tr. Ct. Slip Op. at 6. Thus, the court concluded, "contact with his mother's side of the family is highly beneficial emotionally for [Child] in helping him deal with the loss of his mother." Tr. Ct. Slip Op. at 6.

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throughout the custody proceedings, and testified that he no longer trusted him. Upon being questioned by the court, it was clear that [Father's] mistrust of [Great-grandfather] involved only the personal relationship between the two men, and had nothing to do with the relationship between [Child] and [Great-grandfather]. However, [Father] clearly was allowing his anger toward [Great-grandfather] to interfere with [Child's] relationship with [Great-grandfather.]

Tr. Ct. Slip Op. at 4-5.

As dictated by the statute, the trial court next considered whether the court-ordered partial custody would interfere with Father's relationship with Child. Father argued that it would interfere because of the animosity between Grandmother and him, which, he noted, had led to the legal proceedings. The trial court, however, aptly commented:

> If the mere existence of animosity and dislike between parent and grandparent were enough to prevent grandparent custody, surely there would be very few court ordered periods of grandparent custody. For after all, if the parties were able to get along together, they would not be in court to begin with.

Tr. Ct. Slip Op. at 7. Instead, the court distinguished this case from those where grandparent partial custody would have either distressed the child or adversely impacted the parent's ability to parent him. Moreover, the court found credible Grandmother's assertion that she would not express negative feelings about Father to Child, or create a situation that would negatively impact Child. The court also expressed confidence that Father would not let his animosity toward Grandmother cause harm to Child, as the court found it clear that Father was a capable father who loved his son. Additionally, the court noted that there had been no incidents of problems in the visits thus far.

The court therefore found that Grandmother had met her burden of demonstrating that partial custody would be in Child's best interests and would not interfere with the parent-child relationship, and thereby, had rebutted the presumption that Father's decision limiting or eliminating Grandmother's contact with Child was in Child's best interests. Tr. Ct. Slip. Op. at 8. The court thus granted partial custody to

Grandmother one weekend per month and one week per summer.[6]

Father timely appealed to the Superior Court, asserting that the application of the statute violated his substantive due process rights under the Fourteenth Amendment to the United States Constitution.[7] In a published opinion, a panel of the Superior Court[8] acknowledged that the United States Supreme Court recently held, "it cannot be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Fausey v. Hiller,* 851 A.2d 193, 195 (Pa. Super. 2004) (quoting *Troxel,* 530 U.S. at 67). Given the fundamental right of parents, the Superior Court utilized a strict scrutiny analysis and considered whether the imposition on a parent's fundamental rights was necessary to promote a compelling state interest and was narrowly tailored to effectuate that interest. *Id.*[9]

The Superior Court began its analysis by comparing Pennsylvania's statute to the Washington State statute which the United States Supreme Court found unconstitutional as applied in *Troxel. Fausey,* 851 A.2d at 196. The court found Pennsylvania's statute and its application in this case "readily

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[6] The court also addressed and found unavailing Father's constitutional challenges to Section 5311. These issues will be discussed in detail *infra.*

[7] Father also asserted a facial challenge to the statute under the Equal Protection Clause, asserting that the statute treated children of single parents differently than children of married parents without a sufficient government interest. Father has not raised that challenge before this Court, and we will not address it.

[8] Judge Lally-Green concurred in the result of the majority opinion written by the late Judge Cavanaugh and joined by Judge Gantman.

[9] As will be discussed more fully *infra,* the United States Supreme Court specifically refused to define the "precise scope of the parental due process right in the visitation context" or to set a standard of scrutiny to be applied. *Troxel,* 530 U.S. at 73. Justice Thomas, however, asserted that strict scrutiny should be applied to any infringement of a parent's fundamental right. *Id.* at 80 (Thomas, J., concurring).

distinguishable" from the situation in *Troxel.*[10] Moreover, the court held that the trial court complied with Pennsylvania precedent by placing the burden of proof on the petitioning grandparent due to the deference given to the decisions of fit parents.[11] Finally, the Superior Court concluded that the trial court properly applied the statute with the necessary presumption that Father's decisions were in the best interests of the Child and that the record supported the trial court's conclusions that Grandmother overcame the presumption by demonstrating that partial custody was in Child's best interests and that it would not interfere with Father's relationship with Child. The Superior Court therefore affirmed the trial court's decision, finding the application of Section 5311 constitutional.

From this published decision, Father petitioned for this Court's review, which we granted to consider whether Section 5311 violates the Due Process Clause of the United States Constitution as an infringement upon a parent's fundamental rights. This issue of first impression for our Court was specifically left to the individual states in the United States Supreme Court's decision in *Troxel,* 530 U.S. at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context"). Before discussing the parties' arguments which hinge on divergent readings of the United States Supreme Court's decisions in *Troxel,* we must first discuss what the divided High Court held, what it implied, and what it left open for determination by the individual states.

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[10] The court also concluded that the statute did not violate the Equal Protection Clause.

[11] *See Charles v. Stehlik,* 744 A.2d 1255, 1258 (Pa. 2000) (holding that, in custody disputes between a biological parent and a third party, the "evidentiary scale is tipped and tipped hard to the biological parent's side"); *B.A. v. E.E.,* 741 A.2d 1227, 1229 n. 1 (Pa. 1999); *Ellerbe v. Hooks,* 416 A.2d 512, 513-14 (Pa. 1980).

The facts involved in *Troxel* are similar to those in the case before this Court. Each case involves a child's tragic loss of a parent and the later decision of the surviving parent to restrict contact between the child and a grandparent on the deceased parent's side, where the grandparent and the child had a significant relationship prior to the death of the parent. In the opinion announcing the judgment of the Court, in *Troxel,* Justice O'Connor, joined in full by Chief Justice Rehnquist and Justices Ginsburg and Breyer, initially noted that all fifty states have enacted statutes granting grandparents (and others) the ability to seek visitation or custody in part in "recognition of the changing realities of the American family." *Troxel,* 530 U.S. at 64; *see also, id.* at 74 n. 1. The statutes are designed to "ensure the welfare of the children therein by protecting the relationships those children form with such third parties." *Id.* at 64.

The plurality acknowledged, however, that protection of these relationships comes at a cost to the parent-child relationship. In addressing the mother's argument that the Washington statute violated her due process rights under the Fourteenth Amendment, the plurality observed that "[t]he liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized" by the United States Supreme Court. *Id.* at 65 (citing and discussing, *inter alia, Washington v. Glucksberg,* 521 U.S. 702, 720 (1997); *Parham v. J.R.,* 442 U.S. 584, 602 (1979); *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-5 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 401 (1923)). "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel,* 530 U.S. at 67.

The plurality noted that the Washington statute at issue in *Troxel* was "breathtakingly broad" in that it stated that "any person" may petition for visitation at "any time." *Id.* Further, the plurality faulted the statute for allowing a trial court to overturn a fit parent's decision merely based on the trial court's determination of what was in the best interests of a child, in apparent tension, if not actual conflict with, the United States Supreme Court's confirmation in *Parham* of the presumption that fit parents act in the best interests of the child. *Id.* at 68-70 (citing statutes that protect a parent's fundamental right by providing a parental presumption). Thus, the plurality found that the trial court failed to give "special weight" to the mother's determination of the children's best interests. *Id.* at 69. The opinion also noted that the mother did not cut off but merely limited visitation. *Id.* at 71 (noting that some states' statutes require that a parent have actually denied all visitation). The plurality specifically criticized the trial court's "slender findings," presumption in favor of grandparent visitation, and "failure to accord significant weight to [the mother's] already having offered meaningful visitation to the [grandparents]." *Id.* The plurality then concluded, "the visitation order in this case was an unconstitutional infringement on [mother's] fundamental right to make decisions concerning the care, custody and control of her two daughters." *Id.* at 72. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73.

While the *Troxel* plurality found the trial court's application of the statute unconstitutional, it did not find the statute facially unconstitutional.[12] Instead, and directly

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[12] The appeal to the United States Supreme Court was from a decision of the Washington State Supreme Court. *Id.* at 63. The Washington Supreme Court declared its statute facially unconstitutional primarily due to two problems. *Id.* First, it concluded that the statute's lack of a threshold

relevant to the case *sub judice,* the plurality refused to "consider the primary constitutional question passed on by the Washington Supreme Court--whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. The plurality opined,

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Because much state-court adjudication in this context occurs on a case- by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id. (citation omitted).

Justice Souter concurred in the judgment of the plurality in that he also would have affirmed the judgment of the Washington Supreme Court; however, unlike the plurality he would have held the statute facially unconstitutional, finding that the statute swept too broadly by allowing "any person" to seek custody at "any time," requiring merely a showing that visitation was in the best interests of the child. *Id.* at 76 (Souter, J., concurring). Like the plurality, Justice Souter did not rely upon the Washington State court's requirement that

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showing of harm or potential harm to the child from the denial of visitation prevented the state's interference with the rights of parents. *Id.* Second, the state court held the statute unconstitutional because it swept too broadly and thus violated parents' rights by allowing courts to grant visitation to "any person" at "any time" based solely on a best interests analysis. *Id.*

grandparents demonstrate harm to the child resulting from the lack of visitation prior to a constitutional grant of visitation.

Also concurring in the judgment, Justice Thomas noted the other justices' refusal to designate a standard of scrutiny to be applied to infringements on the fundamental right at issue. He asserted that strict scrutiny should be applied because the right involved was fundamental, but observed that the Washington statute in question would not even survive rational basis scrutiny for want of a legitimate government interest in "second guess[ing] a fit parent's decision regarding visitation with third parties." *Id.* at 80 (Thomas, J., concurring).

In contrast, Justice Stevens dissented from the plurality's conclusion that the statute was unconstitutional as applied, and further concluded that the statute was facially constitutional in that the statute had a "plainly legitimate sweep." *Id.* at 85 (Stevens, J., dissenting). While the plurality and Justice Souter refused to base their conclusions on the statute's lack of a requirement of harm resulting from the lack of visitation, Justice Stevens forcefully rejected the assertion: "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting even arbitrary parental decisions from any challenge absent a threshold finding of harm." *Id.* at 86 (Stevens, J., dissenting). Instead, he asserted that limits on the fundamental right of parents resulted from the balancing of parental rights against the state's "long-recognized interests as *parens patriae*." *Id.* at 88 (Stevens, J., dissenting).[13]

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[13] Additionally, Justice Stevens espoused a potential constitutional right yet to be elucidated by the Court regarding a child's "complementary interest in preserving relationships that serve her welfare and protection." *Id.* at 88 (Stevens, J., dissenting). "At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it

Finally, Justice Kennedy dissented.[14] While acknowledging the existence of a parent's constitutional right, he asserted that the case should be reversed due to the error he found in the Washington Supreme Court's conclusion that parental rights could not be infringed without proof of something more than that visitation would be in the child's best interests. Additionally, like Justice Stevens, he concluded that a showing of harm to the child should not be required prior to a grant of visitation to a third party. *Id.* at 92 (Kennedy, J., dissenting). Noting that many children today have significant relationships with non-parents, he opined that the parental right should be viewed differently depending on whether the case involves a claim of visitation with a complete stranger or visitation with a *de facto* parent. Although Justice Kennedy concluded that the best interests standard may provide sufficient protection of the parental right, he noted that the disruptive effect of litigation involved in custody battles could require a higher standard:

> Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.

Id. at 101 (Kennedy, J., dissenting).

The foregoing analysis demonstrates that all the Justices, with the exception of Justice Scalia, recognized the existence of a constitutionally protected right of parents to make decisions concerning the care, custody, and control of their children, which includes determining which third parties may visit with their children and to what extent. Further, a

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comes to parental rights, children are so much chattel." *Id.*, at 88-89 (Stevens, J., dissenting).

[14] Justice Scalia also dissented based on his conclusion that the parental right was an unenumerated right. *Id.* at 91-92 (Scalia, J., dissenting).

majority agrees that fit parents are entitled to a presumption that they act in the best interests of their children. However, while Justices Stevens and Kennedy explicitly concluded that the Constitution did not require a third party requesting visitation to demonstrate that the child would be harmed by the lack of visitation, the plurality refused to speak to the issue. Although Justice Thomas would apply a strict scrutiny standard of review to infringements of a parent's fundamental right, the rest of the Court was notably silent on this issue. Instead, the court left the decision, at least for the present, to the states in their case-by-case application of individual statutes.

Justice O'Connor's plurality opinion, however, provides some guidance on what constitutes *impermissible* application and thus presumably highlights issues which should raise red flags in assessing the constitutionality of a particular statute's application. As noted above, the plurality held that the Washington statute was "breathtakingly broad" in that it allowed "any person" at "any time" to petition for custody. The justices also noted that the statute failed to account for the presumption that parents act in the best interests of their children, and that the trial court in *Troxel* had, in fact, impermissibly presumed that visitation should be granted. Finally, the plurality opinion criticized the "slender findings" supporting the trial court's overturning of the fit parent's exercise of parental discretion.

Against this backdrop, Father requests that we reverse the Superior Court and hold that it erred in concluding that Section 5311 was constitutional as applied. He attempts to diminish the importance of the differences between the statute in *Troxel* and the significantly narrower Section 5311 and, instead, focuses on the factual similarity between the case at bar and the factual scenario in *Troxel*. He claims that the trial court below failed to afford his decision "special weight," and instead substituted its view of what was in the best interests of Child, which the plurality in *Troxel* found unconstitutional.

He maintains that the preponderance of the evidence standard of proof utilized by the court below should only apply between parties with equal rights to the child, such as two fit parents, and should not apply to a dispute between parents and third parties. Instead, he claims that grandparents, who cannot claim a fundamental right to visitation or partial custody, should be required to demonstrate compelling circumstances such as unfitness of the parent or significant harm to the child resulting from denial of visitation or partial custody before the courts may interfere with the parents' fundamental right to the care, custody, and control their own children. Additionally, he asserts that, like the mother in *Troxel,* he was willing to allow Grandmother some contact with Child.[15] He urges this Court to follow our sister states that have found statutes providing for visitation or partial custody either facially unconstitutional or unconstitutional as applied.

Conversely, Grandmother asserts that this case is "a paradigm of a trial court's proper application of Section 5311," in which the court "weighed all the factors necessary to render a decision that both promoted the best interests of the child and protected the substantive due process rights of the parent." Grandmother's Brief at 12. Grandmother contends that Section 5311, unlike the "breathtakingly broad" statute in *Troxel,* strikes a perfect balance between protecting the fundamental rights of a parent and the state's interest in protecting the best interests and welfare of a child who has lost a parent and is at risk of losing his relationship with his grandparent. Grandmother observes that the *Troxel* plurality opinion contrasted the excessively broad Washington statute with more narrow statutes like Pennsylvania's.[16] Further, she

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[15] As noted above, Father's assertions regarding whether he would permit contact with Grandmother absent a court order were not found credible by the trial court.

[16] In particular, Grandmother points to the Court's recognition of Minnesota's statute, Minn.Stat. § 257.022(2)(a)(2)(1998), which requires that visitation be in the best interests of the child and not interfere with the

notes that Pennsylvania courts have applied a weighted best interests analysis to grandparent custody cases.

Grandmother next distinguishes the *Troxel* plurality's criticism of the trial court's failure to accord special weight to the parent's decision and the court's "slender findings" of fact based in part on the trial judge's experiences with his own grandparents. In contrast, she notes the trial court *sub judice* presumed that Father would act in Child's best interests and made detailed findings of fact regarding whether it was in Child's best interests to order partial custody. Grandmother also observes that the trial court imposed the burden of proof on Grandmother, in contrast to the trial court in *Troxel.* Further, the trial court in this case carefully considered the likelihood that Father would provide Child with opportunities to continue his relationship with Grandmother and the effect that court-ordered custody would have on the parent-child relationship. Additionally relying on *Troxel* and the decisions of some of our sister states, discussed *infra,* Grandmother rejects Father's suggestion that the Constitution requires her to demonstrate parental unfitness or harm to the child resulting from the denial of partial custody.

With these arguments in mind, we turn to the constitutionality of Section 5311 as applied in this case.[17] As set forth in *Troxel,* the right to make decisions concerning the

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parent-child relationship and considers the amount of personal contact prior to the petition for visitation, and Nebraska's statute, Neb.Rev.Stat. § 43-1802(2)(1998), which requires clear and convincing evidence of a significant beneficial relationship, as well as a determination that visitation is in the child's best interests, and will not interfere with the parent-child relationship.

[17] Our scope of review of custody orders is very broad. *See Albright v. Commonwealth, ex rel. Fetters,* 421 A.2d 157, 158-59 (Pa. 1980). However, we will not use that scope of review to nullify the factfinding functions of the trial court, and we will not reverse a trial court's custody order where the trial court has not abused its discretion. *Charles,* 744 A.2d at 1257. Moreover, our review of questions of law is plenary. *See R.M. v. Baxter,* 777 A.2d 446, 449 (Pa. 2001).

care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause. *Troxel,* 530 U.S. at 67. While the United States Supreme Court declined in *Troxel* to articulate a standard of review regarding infringements of this fundamental right, this Court traditionally has applied a strict scrutiny analysis to asserted violations of fundamental rights protected by the Due Process Clause. *See Khan v. State Bd. of Auctioneer Examiners,* 842 A.2d 936, 947 (Pa. 2004); *Nixon v. Commonwealth,* 839 A.2d 277, 281 (Pa. 2003). While the decisions of our sister states are not binding on this Court, we further note that numerous state courts that have addressed the constitutionality of grandparent visitation statutes have also applied a strict scrutiny analysis.[18] Thus, given the fundamental nature of the right, we conclude that we must apply a strict scrutiny analysis to any infringement by the state of the fundamental right of parents to direct the care, custody, and control of their children. Accordingly, as this Court has previously defined the appropriate test to apply when utilizing strict scrutiny review, we must determine if the infringement is supported by a compelling state interest and if the infringement is narrowly tailored to effectuate that interest. *See Khan,* 842 A.2d at 947; *Nixon v. Commonwealth,* 839 A.2d at 281; *see also Reno v. Flores,* 507 U.S. 292,

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[18] Our sister states have applied strict scrutiny in the following cases when reviewing statutes, and applications thereof, relating to grandparents' or third parties' petitions for visitation: *R.S.C. v. J.B.C.,* 812 So.2d 361 (Ala. Civ. App. 2001); *Linder v. Linder,* 72 S.W.3d 841 (Ark. 2002); *Roth v. Weston,* 789 A.2d 431 (Conn. 2002); *Richardson v. Richardson,* 766 So.2d 1036 (Fl. 2000); *Lulay v. Lulay,* 739 N.E.2d 521 (Ill. 2000); *Santi v. Santi,* 633 N.W.2d 312 (Iowa 2001); *Blixt v. Blixt,* 774 N.E.2d 1052 (Mass. 2002), *cert. denied,* 537 U.S. 1189 (2003); *Rideout v. Riendeau,* 761 A.2d 291 (Me. 2000); *Hoff v. Berg,* 595 N.W.2d 285 (N.D. 1999); *Moriarty v. Bradt,* 827 A.2d 203 (N.J. 2003), *cert. denied,* 540 U.S. 1177 (2004); *Harrold v. Collier,* Nos. 2004-1492, 2004-1647, 2005 WL 2483241, at *6 (Ohio Oct. 10, 2005); *Hawk v. Hawk,* 855 S.W.2d 573 (Tenn. 1993); *In re Pensom,* 126 S.W.3d 251 (Tex. Ct. App. 2003); *In re C.A.M.A.,* 109 P.3d 405 (Wash. 2005); *M.B.B. v. E.R.W.,* 100 P.3d 415 (Wyo. 2004).

301-02 (1993) (commenting that Supreme Court cases have interpreted the "Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (emphasis in original)).

Our scope of review of custody orders is very broad. *See Albright v. Commonwealth, ex rel. Fetters,* 421 A.2d 157, 158-59 (1980). However, we will not use that scope of review to nullify the factfinding functions of the trial court, and we will not reverse a trial court's custody order where the trial court has not abused its discretion. *Charles,* 744 A.2d at 1257. Moreover, our review of questions of law is plenary. *See R.M. v. Baxter,* 777 A.2d 446, 449 (Pa. 2001).

The compelling state interest at issue in this case is the state's longstanding interest in protecting the health and emotional welfare of children. Numerous times, this Court, like the United States Supreme Court, has approved of the state's exercise of its *parens patriae* interest and allowed infringements on parental rights where the welfare of children is at stake. *See In re Adoption of J.J.,* 515 A.2d 883, 893 (Pa. 1986) (balancing state's *parens patriae* interest in protecting the welfare of a child against the parent's rights and determining that the clear and convincing evidence standard, rather than reasonable doubt, is appropriate in cases involving the termination of parental rights). For example, we have permitted the termination of parental rights and declarations of dependency. *See, e.g., In re C.A.E.,* 532 A.2d 802 (Pa. 1987) (reinstating trial court's order terminating parental rights). Moreover, we have permitted grants of custody to non-biological parents over the objections of biological parents. *See, e.g., Charles,* 744 A.2d 1255 (affirming grant of primary custody to stepfather over objection of biological father); *Ellerbe,* 416 A.2d 512 (affirming award of primary custody to grandmother over objection of biological father).

Having recognized the existence of a compelling interest, we must determine whether the statute applied in this case is narrowly tailored to serve that interest. We first observe that Pennsylvania's statute and its application in this case are clearly distinguishable from the unconstitutional application of the statute in *Troxel.* Unlike the statute in *Troxel,* which extended standing to any person at any time, Section 5311 narrowly limits those who can seek visitation or partial custody not merely to grandparents but specifically to grandparents whose child has died.[19] This limitation, it should be noted, furthers our General Assembly's express public policy to assure the "continuing contact of the child or children with grandparents when the parent is deceased, divorced or separated." 23 Pa.C.S. § 5301. Moreover, the rationale behind the stated public policy is clear: in the recent past, grandparents have assumed increased roles in their grandchildren's lives and our cumulative experience demonstrates the many potential benefits of strong inter-generational ties. *Troxel,* 530 U.S. at 64.

While acknowledging the general benefits of these relationships, we cannot conclude that such a benefit always accrues in cases where grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent.[20] In contrast, however, we refuse to close our minds to the possibility that in some instances a court may overturn even the decision of a fit parent to exclude a grandparent from a grandchild's life, especially where the grandparent's child is deceased and the grandparent relationship is longstanding and significant to the grandchild.

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[19] While we acknowledge that the statute applies to both grandparents and great-grandparents whose child (or grandchild) has died and left a grandchild (or great-grandchild), we refer only to grandparents for ease of discussion.

[20] This consideration is especially resonant given the strain that custody litigation places on the children as well as parents and grandparents, as noted by Justice Kennedy in *Troxel,* 530 U.S. at 101 (Kennedy, J., dissenting).

We must therefore determine whether Section 5311 is narrowly tailored to protect the fundamental rights of fit parents while providing for appropriate state intervention to protect the welfare of children through court-ordered grandparent visitation or partial custody.

In apparent response to the need to balance the state's interest and parents' rights, Section 5311 requires courts to ensure that the visitation or partial custody will not interfere with the parent-child relationship and to determine that visitation or partial custody serves the child's best interests. Finally, the Pennsylvania statute requires courts to consider the amount of contact between a grandparent and a grandchild before the petition was filed, thus allowing an assessment of the strength of the pre-petition relationship and the willingness of the parent to provide access to the child without court order.

In addition to the language of the statute, our precedent requires our courts to do what the United States Supreme Court faulted the Washington trial court for failing to do--to provide a presumption in favor of the decision of a fit parent. This Court previously has struggled with the appropriate deference to afford parents in custody matters. In *Ellerbe,* decided before the enactment of Section 5311, we determined the appropriate standard to apply when faced with a custody (not visitation or partial custody) contest between a parent and a non-parent. Initially, we noted that, in custody disputes between parents, the burden of proof is shared equally between the parties and the focus is on the best-interests of the child. *Ellerbe,* 416 A.2d 512. On the other extreme, we noted that the Juvenile Act, 42 Pa.C.S. § 6301, *et seq.,* dictated that, in a contest between parents and the state, the state bears the burden of showing that the child is delinquent or dependent before the state may wrest custody from a parent. *Id.* Between these poles lie custody disputes involving parents and third parties, such as grandparents. In *Ellerbe,* we acknowledged that in such cases the Court lacked legislative

guidance regarding how to consider custody requests of third parties. *Id.* Thus, we adopted the standard developed by the Superior Court:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side.

Id. at 514 (quoting and adopting the test set forth in *In re Hernandez*, 376 A.2d 648, 654 (Pa. Super. 1977)).

Fifteen years later, in *Rowles v. Rowles,* 668 A.2d 126, 128 (Pa. 1995), we again considered the weight that should be afforded parents' preferences in custody disputes with third parties. In that case, a plurality of this Court recommended that the *prima facie* requirement of *Ellerbe* be dropped and replaced with the recommendation set forth in then Justice Flaherty's concurring opinion in *Ellerbe:*

> By clearly eliminating the presumption *per se,* and mandating that custody be determined by a preponderance of evidence, *weighing parenthood as a strong factor for consideration,* custody proceedings would be disentangled from the burden of applying a presumption that merely beclouds the ultimate concern in these cases: the determination of what affiliation will best serve the child's interests, including physical, emotional, intellectual, moral, and spiritual well-being.

Rowles, 668 A.2d at 128 (emphasis in original). Three justices joined the award of custody to the parent in *Rowles,* but voiced a strong opposition to dispensing with the presumption in favor of the parents and adopting the lower standard of merely considering parenthood as a "strong factor." *Id.* (Montemuro, J., concurring, joined by Zappala and Cappy, JJ.).

A few years later, in *B.A. v. E.E.,* we reaffirmed the presumption in favor of parents set forth in *Ellerbe:*

> Because the *Rowles* opinion did not command a majority of the court, the presumption that parents have a right to the custody of their children as against third parties remains in effect. Whether the parents' interest in their children is referred to as a presumption or as a factor to be weighed, however, the main idea is that parents are to receive special consideration: as the court put it in *Ellerbe,* special weight and deference should be accorded the parent-child relationship.

B.A. v. E.E., 741 A.2d at 1229 n. 1; *see also Charles,* 744 A.2d at 1258. Thus, while the Court has considered other alternatives, we maintain a presumption in favor of parents that meaningfully tips the balance in the parent's favor.

As previously mentioned, Father argues that, in addition to the requirements of Section 5311, grandparents must demonstrate that a child will suffer harm as a result of the denial of visitation or partial custody. The United States Supreme Court in *Troxel* refused to determine "whether the Due Process Clause requires all nonparent visitation statutes to include a showing of harm or potential harm as a condition precedent to granting visitation." *Troxel,* 530 U.S. at 73. Moreover, while some of our sister states have required a finding of harm prior to a grant of visitation or partial custody either under the Due Process Clause or their own

constitutions,[21] a number of courts have either declined to require third parties to demonstrate harm or have found that grandparents may satisfy a requirement of harm merely by showing that the child will be harmed by the termination of a

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[21] The following courts have required a finding of harm before permitting a grant of custody or visitation to a third party: *Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004) (requiring clear and convincing evidence of parental unfitness or that the welfare of the child requires third party visitation); *Linder v. Linder*, 72 S.W.3d 841, 858 (Ark. 2002) (requiring a showing of "some other special factor such as harm to the child or custodial unfitness that justifies state interference"); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002) (requiring a showing of real and emotional harm to the child and a parent-like relationship with child); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995) (finding statute unconstitutional and requiring a showing of harm prior to a grant of visitation); *Von Eiff v. Azicri*, 720 So.2d 510 (Fl. 1998) (holding that state may not intrude on fundamental right of parents except where the child is threatened with harm); *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002) (permitting interference with parental rights only in limited instances to protect the health, safety, and welfare of the child); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003) (declaring statute involving grandparent visitation after parental divorce facially unconstitutional due to statute's failure to require both a showing of parental unfitness and harm to the child beyond mere loss of a beneficial relationship to the grandparents); *Blixt v. Blixt*, 774 N.E.2d 1052, 1059 (Mass. 2002), *cert. denied*, 537 U.S. 1189 (2003) (requiring a showing of harm to the child which would satisfy the requirement that there be a "compelling and legitimate State interest in mitigating potential harm to children in non-intact families, an area in which the State has been traditionally and actively involved."); *Moriarty v. Bradt*, 827 A.2d 203 (N.J. 2003), *cert. denied*, 540 U.S. 1177 (2004) (requiring preponderance of evidence that lack of visitation will cause harm to the health and welfare of the child); *Neal v. Lee*, 14 P.3d 547 (Okla. 2000) (requiring showing of harm to child before state may interfere with parental decision); *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003) (requiring a showing either of parental unfitness or compelling circumstances such as significant harm to child in the absence of visitation not merely that child would benefit from visitation); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (requiring substantial danger of harm); *In re Pensom*, 126 S.W.3d 251 (Tex. Ct. App. 2003) (requiring showing of parental unfitness or significant impairment to child's physical health or emotional well-being resulting from lack of visitation).

beneficial relationship with his or her grandparents.[22] Additionally, our statute does not require a specific finding of harm, and our precedent militates against requiring grandparents to demonstrate harm as a condition precedent to a grant of visitation. Specifically, this Court has permitted non-biological parents to maintain or obtain primary custody of children over the objections of biological parents so long as there are other circumstances which "clearly indicate the appropriateness of a custody award to the non-parent."[23] *See Ellerbe,* 416 A.2d 512; *see also Rowles,* 668 A.2d at 128

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[22] The following courts either have not required a finding of harm or have found harm merely in the denial of visitation with the third party: *Jackson v. Tangreen,* 18 P.3d 100 (Ariz. Ct. App. 2000), *cert denied,* 534 U.S. 953, (2001) (finding statute facially constitutional in that statute required consideration of parties motivation, historical relationships and amount of visitation requested); *Vibbert v. Vibbert,* 144 S.W.3d 292 (Ky. Ct. App. 2004) (showing of harm unnecessary); *Galjour v. Harris,* 795 So.2d 350 (La. App. 1 Cir.) *writ denied,* 793 So.2d 1229 (La.), *cert. denied,* 534 U.S. 1020 (2001) (upholding constitutionality of statute where parent is deceased, interdicted, or incarcerated without any further qualifications); *Rideout v. Riendeau,* 761 A.2d 291 (Me. 2000) (upholding the constitutionality of the statute, noting the potential traumatic effect of cessation of the grandparent relationship on the child); *Moriarty v. Bradt,* 827 A.2d 203 (N.J. 2003); *cert. denied,* 540 U.S. 1177 (2004) (requiring preponderance of evidence that lack of visitation will cause harm to the health and welfare of the child, but stating that harm may be demonstrated by death of parent or dissolution of family); *Harrold v. Collier,* Nos. 2004-1492, 2004-1647, 2005 WL 2483241, at *6 (Ohio Oct. 10, 2005) (holding grant of grandparent visitation warranted where grandparents had raised child for several years following the death of child's mother); *In re Marriage of O'Donnell-Lamont,* 91 P.3d 721 (Or. 2004) (refusing to require showing of unfitness or harm prior to grant of custody to third party); *Brandon L. v. Moats,* 551 S.E.2d 674 (W.Va. 2001) (finding due process concerns satisfied by statutory requirements that courts consider the best interests of the child and the effect of visitation on the parent-child relationship).

[23] We acknowledge that third parties seeking visitation and custody must meet a stringent test for standing. *See T.B. v. L.R.M.,* 786 A.2d 913, 916 (Pa. 2001) (noting that standing may be established either by invoking specific statutory authorization or by demonstrating that the petitioning party stands *in loco parentis* to the child).

(noting that in *Ellerbe* "all seven justices, agreed on several principles: 'the parent-child relationship should be considered to be of importance in determining which custody arrangement is in the child's best interest,' 'special weight' and 'deference' should be accorded the parent-child relationship, and the relationship should not be disturbed 'without some showing of harm' or unless circumstances 'clearly indicate the appropriateness of awarding custody to a non-parent' " (internal citations omitted)). Moreover, we conclude that requiring grandparents to demonstrate that the denial of visitation would result in harm in every Section 5311 case would set the bar too high, vitiating the purpose of the statute and the policy expressed in Section 5301, which is to assure the continued contact between grandchildren and grandparents when a parent is deceased, divorced, or separated. Instead, we conclude that the stringent requirements of Section 5311, as applied in this case, combined with the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm.[24]

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[24] Unlike Mr. Chief Justice Cappy, we decline to demand a specific finding of harm by the trial court prior to a grant of partial custody in the case at bar. Moreover, we observe that consideration of harm resulting from the denial of grandparent visitation or partial custody is to some extent implicit in the statute because the statute is triggered only when a child has suffered the loss of a parent, and visitation or partial custody is allowable only when the court concludes that the grandparent relationship is in the best interests of the grieving child. It is beyond cavil that the child's loss of an additional beneficial relationship will result in some degree of harm. Nevertheless, we recognize that a demonstration of significant harm could certainly strengthen a grandparent's argument that visitation or partial custody is in the best interests of the child and acknowledge that the justification supporting a grant of visitation or partial custody should be correspondingly more convincing as the extent of the custody granted increases, because greater periods of custody present greater infringement on a parent's constitutional right to the direct the care, custody, and control of the child.

The trial court in the case *sub judice* applied the necessary presumption and gave "special weight" to the decision of Father. Nevertheless, the court found that Grandmother had met this burden given the court's conclusion that the child benefited from spending time with Grandmother, with whom he had a longstanding and close relationship and from whom he received emotional support in the aftermath of the loss of his mother. We, therefore, find that the trial court satisfied the requirements of Section 5311 and that its application survives our strict scrutiny. Accordingly, the order of the Superior Court is affirmed.

Justice CASTILLE, SAYLOR and EAKIN join the opinion.

Former Justice NIGRO did not participate in the decision of this case.

Justice NEWMAN files a concurring opinion.

Chief Justice CAPPY files a dissenting opinion.

* * * * *

Justice NEWMAN concurring.

I join the well-reasoned Opinion of the Majority in this matter but write separately to indicate the strength of my conviction that even greater forward movement in this area of children's rights is required. Security, continuity, and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child. The law finally needs to recognize that the child, as the focus in various types of proceedings, has the same inalienable rights to the pursuit of life, liberty, and happiness as an adult. Therefore, I write to emphasize that it is time to regard the best interests of the child as a fundamental and momentous right. Further, I am convinced that this Court needs to provide some guidance toward ascertaining a child's fundamental best interests.

Children are our most precious resource, and it is essential that they have a chance to be brought up in an environment where they are nurtured and given the chance to grow into law-abiding, productive members of the community. Children are vulnerable, impressionable, and in need of guidance and support. This is particularly true when a child experiences the loss of a parent. That support may spring from the child's relationship with a parent, a grandparent, a teacher, or a stranger, but will nearly always be provided by a parent or a grandparent. Situations like the instant matter in which a grandparent cares for a child during the parent's illness and is instrumental in preparing the child for the death of his or her parent are all too common. It is the emotional health of a child concomitant with the emotional bonds formed during childhood that determine whether the child ultimately becomes a productive member of the community.

Development of Parental Rights

Historically, parents have maintained complete discretion over what caretakers to trust, what associations to encourage, and what role models to endorse. Pursuant to the early common law, children were the chattels of their parents, who could do as they wished with the child. Barbara Bennett Woodhouse, " 'Who Owns the Child?': Meyer and Pierce and the Child as Property," 33 Wm. & Mary L. Rev. 995, 1037 (Summer 1992) (hereinafter "Child as Property") (children were treated "as assets of estates in which fathers had a vested right.... Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance.") (internal quotation marks omitted); *Hernandez v. Thomas,* 39 So. 641, 642 (Fla. 1905) (holding mother's deathbed designation of the grandmother as a guardian for her children ineffective because only the father has the right of testamentary disposition and father had consigned the children to an orphanage); *Eustice v. Plymouth Coal Co.,* 13 A. 975 (Pa. 1888) (ordering thirteen-year-old boy's wages paid directly to his parent). Early cases

emphasized the right of the parent, superior to all others, to the care and custody of the child. *See, e.g., Norris v. Pilmore,* 1 Yeates 405 (Pa. 1794) (suit by mother and master against clergyman for marrying minor child without her permission and against apprenticeship agreement); *Pease v. Burt,* 3 Day 485 (Conn. 1806) (noting that a parent has the right to control person of the child); *In re Deming,* 10 Johns. 483 (N.Y. 1813) (holding that a man sentenced to life and subsequently pardoned resumes right to custody and control of his children); *Inhabitants of Dedham v. Inhabitants of Natick,* 16 Mass. 135, 1819 WL 1485, *4 (1819) (concluding that widow assumes the role as head of her family with all parental rights and children "cannot, by law, be separated from her"). This right could be dissolved only by abandonment, surrender, or unfitness. *See Stansbury v. Bertron,* 7 Watts & Serg. 362 (Pa. 1844); *Moritz v. Garnhart,* 7 Watts 302 (Pa. 1838); *see also In re Salter,* 76 P. 51, 52 (Cal. 1904) (holding that court has no discretion to appoint grandmother as guardian of a child if father is not incompetent); *Harper v. Tipple,* 184 P. 1005, 1006 (Ariz. 1919) (determining that child who lived over three years with the grandparents must be transferred to the custody of the father, absent a clear showing of incompetency).

This centralization of authority was a necessary function of state reliance on parents to raise their children to be functionally responsible citizens and to keep them from being a drain on state and municipal coffers. The belief was that, in order to carry out these duties effectively, parents required the authority to act in the interest of their children without state interference. Further, the law presumed that the parent is able to display the maturity, wisdom, judgment, and experience that the child lacks. This doctrine of parental preference survives in a somewhat modified form in the presumption that a biologic parent will act in his or her child's best interests. *Troxel v. Granville,* 530 U.S. 57 (2000) (plurality opinion). "Procedure by presumption [, however] is always cheaper and easier than individualized determination." *Stanley v. Illinois,*

405 U.S. 645 (1972). "But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child ... [and][i]t therefore cannot stand." *Id.*

Although federal and state statutes do not identify parental rights, they do receive constitutional protection through the due process clause of the Fourteenth Amendment. *See Pierce v. Soc'y of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. *Meyer* involved a Nebraska statute that prohibited the teaching of any foreign language to a child prior to the eighth grade. The Court held the statute unconstitutional stating that "[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual ... to marry, establish a home and bring up children.... [I]t is the natural duty of the parent to give his children education suitable to their situation in life." *Id.* at 399-400. The Commonwealth relied on the reasoning of *Meyer* in *Commonwealth v. Bey,* 70 A.2d 693 (Pa. Super. 1950).

In *Pierce,* the Court addressed a state statute that prohibited children from attending non-public schools. Again, the Court determined that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce,* 268 U.S. at 534-35. In *In re William L.,* 383 A.2d 1228, 1232 n. 4 (Pa. 1978), this Court observed that a statute "prescribing any particular mode of child rearing would likely be unconstitutional." Later, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), the Court reaffirmed these principles in concluding that a statute requiring children to recite the Pledge of Allegiance over parental objection violated the parents' rights. These became

the foundation cases for the federal theory of "family." However, as the Supreme Judicial Court of Maine articulated in *Rideout v. Riendeau:*

> The constitutional liberty interest in family integrity is not, however, absolute, nor forever free from state interference. The Due Process Clause is not an impenetrable wall behind which parents may shield their children; rather, it provides heightened protection against state intervention in parents' fundamental right to make decisions concerning the care, custody, and control of their children.

Rideout v. Riendeau, 761 A.2d 291, 299 (Me. 2000) (internal citations omitted). But the state maintains an interest in the welfare of its children and may limit parental autonomy "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder,* 406 U.S. 205 (1972). *Accord Ex parte Crouse,* 4 Whart. 9, 1839 WL 3700 *2 (Pa. 1839) (observing that when parents are incapable of fulfilling parental duties and responsibilities, the biologic parents can "be superseded by *parens patriae*").

Development of Children's Rights

Although the common law assumed that parents had the duty and the authority to control the upbringing of their children, the state retained the power and the duty to protect those unable to protect themselves. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972). The government even occasionally superseded the rights of parents when in the government's best interest. *See, e.g., Commonwealth v. Barker,* 5 Binn. 423 (Pa. 1813) (Congress can enlist minors without the consent of their parents). This doctrinal power originated from the authority of the king and is, of course, termed *parens patriae. Parens patriae* enabled the state to intervene when parents were unable or unwilling to provide adequate emotional and physical care for their children. *See*

Prince v. Massachusetts, 321 U.S. 158 (1944). This Court recognized the doctrine of *parens patriae* as early as 1839 in *Crouse*, where the child's mother had committed the child to a workhouse because she felt the child was unmanageable. The father sought custody and a determination that the legislation permitting the Commonwealth to keep the child was unconstitutional. This Court propounded the *parens patriae* doctrine as the rationale by which the Commonwealth could accomplish child behavioral "reformation, by training [children] to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates." *Crouse*, 4 Whart. 9, 1839 WL 3700 at *2. The seeds of the "best interests of the child" dogma were sown.

Traditionally, courts abhorred interference with parental decision-making, reasoning that such interference may undermine parental authority and hinder parents from fulfilling the legal and moral duties imposed by society. The child's best interests generally served as a tiebreaker in custody disputes between parents; nevertheless, they gave way in disputes between a parent and a third party. Nonetheless, sporadically, common law courts, such as that in *Crouse*, recognized exceptions to the blanket rule against interfering with parental autonomy. Thus, although not explicitly recognized as inalienable rights in some early cases, the rights of the child to have his or her best interests considered trumped the right of the parents to the companionship and control of their children. *See, e.g., Crouse, supra; Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1815) (using best interests of the child over parental rights to decide child custody issues); *see also In re Waldron*, 13 Johns. 418 (N.Y. 1816) (finding that it is in best interest of the child to remain with grandfather rather than be placed in the care of father); *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894) (holding that "[t]he right of the parent or the state to surround the child with proper influences is of a

governmental nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived.").

Gradually the concept of children as property became obsolete and judicial attitudes and approaches changed. *See, e.g., Chapsky v. Wood,* 26 Kan. 650, 1881 WL 1006, *1 (1881) ("[A] child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract."); "Child as Property," *supra*; Katharine T. Bartlett, "Re-expressing Parenthood," 98 Yale L.J. 293 (Dec. 1988). Although the remnants of the autonomy and supremacy of the parent to make life-determining decisions for a child remained, some courts adopted the position that parents are the trustees of the child's best interests. Even more significant was the recognition of specific children's rights, some of which reached constitutional magnitude.

Development of Grandparents Rights

At early common law, grandparents lacked any substantive rights with regard to custody of their grandchildren. Even though, biologically, generations emerge telescopically, one out of the other, life expectancies of eighteenth and nineteenth century grandparents often prevented them from becoming active participants in the lives of their grandchildren. The "superior rights" of parents protected parental autonomy and the nuclear family, and negated the interests of grandparents and third parties.

Many commentators believe that the erosion of the nuclear family beginning in the 1960s spawned grandparent visitation statutes in all fifty states, thus challenging strict parental autonomy. *See, e.g.,* Jennifer Kovalcik "*Troxel v. Granville:* In the Battle Between Grandparent Visitation Statutes and Parental Rights, 'The Best Interest of the Child' Standard Needs Reform," 40 Brandeis L.J. 803 (Spring

2002); Ellen Marrus, "Over the Hills and Through the Woods to Grandparents' House We Go: or Do We, Post-Troxel?", 43 Ariz. L. Rev. 751 (Winter 2001). Conversely, grandparent visitation and custody, although statutorily derived, has not risen to a level that enables inclusion within the purview of the Fourteenth Amendment's bundle of "liberty" rights.

As ably discussed by the Majority, the United States Supreme Court invalidated the Washington statute on an "as applied" basis because of its breadth and the failure of the Washington legislature to require due consideration for the rights of a fit parent to determine how his or her child will be raised and with whom that child will associate. The Pennsylvania grandparent custody and visitation statute does not suffer from these infirmities. The General Assembly has narrowly tailored Section 5311[1] to limit grandparent standing to only those grandparents who have experienced the death of their own child and seek to maintain contact with the children of that deceased child. Further, the trial court is directed to consider the parent-child relationship, the best interests of the child, and the extent of the child-grandparent relationship before granting visitation or partial custody.

Grandparents, as important transmitters of family values, as representatives of family legacy, as mediators between parents and children, or as rescuers of families in difficulty, are important resources for society in neutralizing the damaging effects of divorce, death, or drug addition. This statutory expansion of grandparent rights seems to invite

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[1] Section 5311, 23 Pa.C.S. § 5311, states:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

conflict as to when the state government, acting through a trial judge, may influence the resolution of an internal family dispute, rather than recognize the realities of modern society. In this vein, one commentator complained, "If we collectively allow grandparent visitation to be forced upon an unwilling family for no better reason than that some robed stranger thought it best, we have embarked upon a slow decent into judicial supervision of family life which has neither legal limits nor a logical end." Joan C. Bohl, "The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases," 49 Okla. L. Rev. 29, 80 (Spring 1996). However, with appropriate guidance and limited statutory authority, a trial court can weigh the facts in an individual case and provide a reasoned, intelligent, and fair disposition that does not descend to the level of "judicial supervision of family life."

On those occasions where courts granted grandparent visitation, the court usually focused on the facts of each case and awarded visitation or partial custody if the grandparents had a close relationship with the child and there was a disruption in the nuclear family. I believe that, in the twenty-first century, the state's interest in protecting a child's relationship with a third party, particularly a grandparent with whom the child has formed an attachment and benefited from a nurturing and caring association, has heightened because, in some instances, there is no intact or stable family to otherwise protect the child.

Interestingly, in *Meyer, Pierce, Barnette*, and *Yoder,* the challenge to parental rights came from the state, which tried to curtail parental child-rearing decisions in some manner. Grandparent visitation and partial custody cases, however, do not set the state against parental authority but instead mediate between a parent and the interested grandparent. Because of the limited reach of the Pennsylvania statute, this conflict is restricted to a parent and one grandparent or a parent and one set of grandparents.

Best Interests as a Fundamental Right

"A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens...." *Prince*, 321 U.S. at 168. Accordingly, "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotation marks omitted). Hardly a more compelling State interest exists than to keep children safe from the kinds of physical or emotional trauma that may scar a child's health and physical, mental, spiritual, and moral development well into adulthood.

Much attention has been given to the fundamental right of parents to the care, custody, and control of their minor children. The primary justification for this parental preference principle, one that resounds within numerous decisions, is based on the constitutional considerations articulated in *Meyer, Pierce, Barnette*, and *Yoder*. A parent's superior right to custody of the child is an acknowledgment that parents and children have a recognized unique and legal interest in, and a constitutionally protected right to, each other's companionship. The parent has a right to raise the child, yet the child has a corresponding right to be raised by his or her parent. *See generally Stanley v. Illinois*, 405 U.S. 645 (1972). Thus, the rights of the parent and the child are ordinarily compatible for it is generally believed that it is in a child's best interest to be reared by its parent. Further, the liberty interests of parents protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution are also protected by the Constitution extant in this Commonwealth. However, it is not only parents who have a right to familial integrity and constitutional protection.

Article I, Section 1 of our Pennsylvania Constitution states that: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among

which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." The term "men" as used in this Article is generic for all natural persons. Minors are natural persons in the eyes of the law and, therefore, possess a constitutional right to liberty and the pursuit of happiness Because fundamental rights do not mature and come into being magically when one attains the state-defined age of majority, minors, along with adults, are protected by our Constitution and possess constitutional rights. *See, e.g., In Interest of Stephens,* 461 A.2d 1223 (Pa. 1983) (determining that minors possess the constitutional right against placement in double jeopardy); *Commonwealth ex rel. Tabb v. Superintendent of Youth Study Ctr.,* 183 A.2d 317 (Pa. 1962) (freedom from self-incrimination). Further, we have repeatedly held that this Article provides greater protection than that provided by the United States Constitution. *See, e.g., Commonwealth v. Nixon,* 761 A.2d 1151, 1156 (Pa. 2000); *Theodore v. Delaware Valley Sch. Dist.,* 836 A.2d 76, 88 (Pa. 2003).

In *In re William L.,* 383 A.2d 1228 (Pa. 1978), a termination of parental rights case, we established that while the state generally may not enter into the private realm of family life and because parental rights must be accorded significant protection, the state as *parens patriae* has an affirmative duty to protect minor children. Thus, the restraint on state interference in family matters does not reach so far as to compel the courts to protect parental rights at the expense of ignoring the rights and needs of children. *Id.* at 1236.

Having decided that the statute was facially constitutional, the *William L.* Court took great care in applying the statute to the facts. It rejected the appellant's assumption that the purpose of the termination statute was to punish an ineffective or negligent parent and that therefore a finding of parental fault was constitutionally necessary before termination. Rather, the Court pointed out, inquiry should center upon the

welfare of the child rather than the fault of the parent. The state's responsibility to protect its weaker members authorizes interference with parental autonomy and decision-making in appropriate circumstances. Justice Roberts in *William L.* set forth the moral and practical importance of this authority:

> These cases do not, however, support the proposition that the state can never interfere in the parent-child relationship. Indeed, in *Stanley v. Illinois,* supra, the United States Supreme Court recognized that the state had not only a right, but a duty to protect minor children. [*Stanley v. Illinois,*] 405 U.S. at 649, 92 S.Ct. at 1212. See also *Prince v. Massachusetts,* supra (upholding anti-child labor statute against challenge that it unreasonably infringed upon parent's and child's free exercise of religion and parent's right to educate child in her beliefs). Constitutional restraint on state interference in family matters does not compel the courts to protect parental rights at the expense of ignoring the rights and needs of children. In *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the United States Supreme Court rejected the argument that the state's interest in protecting parental authority justified giving parents a veto power over a minor's decision to have an abortion where the minor and the non[-]consenting parent are so fundamentally in conflict and the very existence of the pregnancy has already fractured the family structure.

Id. at 1235 (internal quotation marks omitted).

The fundamental rights of children to have their best interests considered prevails over the fundamental rights of parents to the care, custody, and control of their children in custody determinations between fit parents, in dependency and delinquency proceedings, and in proceedings to terminate parental rights. Although not explicitly stated in these past decades, I believe that Pennsylvania, for some considerable

time, has treated the best interests of the child as a fundamental right.

It is on this basis that I advocate that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right. This interest is expressed in a variety of statutes and proceedings, ranging from the complete severance of parental rights on a judge's finding of parental unfitness, to the limitation of parental choices in the areas, for example, of education, health care, and safety. Thus, I believe that the instant matter involves a situation that burdens two fundamental rights--the right of a fit father to make parenting decisions for the child and the right of the child to have its best interests considered. Many cases, with their emphasis on the importance of family and personal associations, provide support for the view that a child has a due process right to maintain relationships with individuals other than his or her parents. Interestingly, Great Britain has come to terms with the fundamental rights of children. In *Lawrence v. Penbrokeshire County Council,* 2006 WL 1288355, at 38 EWHC 1029 (Queen's Bench Div.) (May 11, 2006), the House of Lords held that where "rights of parents and a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

Before turning to a balancing of these rights, I will briefly consider the form of relief that the grandmother seeks.

Custody v. Visitation

Generally, the right of visitation is derived from the right of custody. There are essentially three types of custody arrangements--full custody, partial custody, and visitation. "The distinguishing elements of these arrangements are '[t]he length of existing visits, the frequency with which they occur, whose home the visits take place in, and who is in effective control of the [child] during the visit.' " *Commonwealth ex rel. Zaffarano v. Genaro,* 455 A.2d 1180, 1182 (Pa. 1983)

(quoting Note, "Visitation Rights of a Grandparent Over the Objection of a Parent: The Best Interests of the Child," 15 J. Fam. L. 51, 67 (1976-77)). Full custody denotes the care, control, and maintenance of a child including all physical and legal aspects of custody, and the child resides with the person to whom custody was awarded. *Black's Law Dictionary* 390 (7th ed. 1999).

Visitation normally represents a period of access by a non-custodial individual. It differs from full custody in that the child does not dwell with the non-custodial individual, and, although this individual can be responsible for the care and safety of the child, he or she may not make important decisions for the child. *Black's Law Dictionary* 1566 (7th ed. 1999). Full custody confers rights and authority upon the one in whom it is placed as opposed to the privilege of visiting. However, in Pennsylvania, visitation and partial custody have meanings somewhat peculiar to the Commonwealth. Here, visitation is limited to the opportunity to see the child wherever he or she might be, only in the presence of the custodial individual, and does not include the right to remove the child from that environment, even briefly. Partial custody is visitation with a child out of the presence of the custodial individual. *Zaffarano,* 455 A.2d at 1182 (citing *Scott v. Scott,* 368 A.2d 288, 290 (Pa. Super. 1976)). It is because of this distinction, that the General Assembly amended the statute to permit grandparents to seek either visitation or partial custody or both.

Standard of Review

Where fundamental rights are in conflict, we must apply a standard of judicial scrutiny that is properly sensitive to the individual interests on both sides. While I generally agree with the Majority that strict scrutiny must be applied to any infringement of a fundamental right, I would find that in matters such as that before us, the standard of review requires both strict scrutiny and a balancing of fundamental rights.

Thus, in determining whether to grant visitation, trial judges must weigh the three competing interests of: the child, the parent, and the state. The interacting interests of the child, the parent, and the grandparents are shaped by societal perceptions of the definition of family. When considered together, the weight given and the value assigned to each of these interests form and define the appropriate standard to be applied.

In balancing the competing interests, I believe that the child is the paramount focus. The child has an interest in being cared for by an adult who will provide protection, companionship, and upbringing. Although the court may seek to determine the child's own views, the child's interest is often unavoidably defined by the views of the adult-spokesperson with whom the child currently resides.

The child's 'best interest' is also not controlled by whether the parent or the non-parent would make a 'better' parent, or by whether the parent or the non-parent would afford the child a 'better' background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection for the child by those who vie for his or her companionship. Instead, in ascertaining the child's best interest, the court must be guided by principles that reflect a considered social judgment. In this Commonwealth, those principles are subsumed within an extensive statutory scheme.

The parental interest is the next concern to be weighed by the trial judge. The parents' interest in the custody and companionship of the child has already achieved heightened legal significance and has been elevated to a fundamental right. The parental interest is a strong factor, but I believe that it still must accommodate the right of the child, as an individual, to have his or her best interests considered. Although third-party interests, the so-called external factors, may then be considered by the court only after resolving those

interests that are fundamental. Often, non-parents, especially grandparents, form an emotional bond with the child. They may seek to perpetuate a continuing relationship with that child through visitation. Although they may sometimes enjoy a protected interest in the companionship of the child when standing *in loco parentis,* I agree that, within the legal landscape, the interests of the grandparents are entitled to little weight in comparison to the stronger interests of the parents and the children. Their greatest consideration only enters into a determination of the child's best interests.

Finally, the court must weigh the interest of the state in protecting the emotional and physical health of its minor citizens and ensuring their proper development. The broader form of the state, that is society, has concern relative to the form and function of the family unit. Society's interest in the family stems from the family's unique ability to teach children to care for one another, to develop a sense of community, and to gain the knowledge that is essential for productive citizenship.

Each of these interests promotes a particular result. When considered together, I believe that the result of a contest between competing interests should be clear. Furthermore, I conclude that the interests, themselves, will determine the appropriate balance to strike. In the context of grandparent visitation, the parental interest predominates over the interest of the grandparents, and the consideration of the child's best interest is entitled to fundamental weight.

Fundamental Rights Analysis

The Pennsylvania statute is of neutral application. There is no presumption contained within the statutory text that the best interest of the child will be promoted by any particular custodial disposition. The statute confers standing and sets the standard, and then the court balances the relative rights of the parties.

Our grandparent visitation statute is meant to protect children's well-being by providing for visitation when it is in their best interests. It also seeks to preserve the right of access of grandparents to their grandchildren under certain specific circumstances. In the declaration of policy preliminary to the grandparent custody and visitation statute, the:

> General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is *deceased,* divorced or separated.

23 Pa.C.S. § 5301 (emphasis added). The specific statutory section states:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S. § 5311.

The competing constitutional rights of parent and child must be evaluated in light of the government's position within these areas of conflicting interests. Further, the Commonwealth has a legitimate concern in aiding in the parental discharge of the primary and fundamental duties and responsibilities of the family with regard to child welfare and safety. The state has a definite and discrete interest in the

safety and welfare of children and exercises this responsibility in a number of different ways. Also, this Court requires that, when competing fundamental constitutional interests are presented, or multiple constitutional concepts face conflict, we must search for harmony to provide each a field of operation.

We have previously given voice to the benefits of the intergenerational relationship between grandparents and grandchildren.

> [Children] . . . have the natural right to know their grandparents and . . . benefit greatly from that relationship. Grandparents give love unconditionally-without entanglement with authority or discipline, and often without pressures of other burdensome responsibilities. Children derive a greater sense of [worth] from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained nowhere else. The benefits derived by a [child] from the society of his or her grandparents have frequently been touched upon by psychologists and psychiatrists.... They are substantial benefits and should not be lightly regarded by our judicial system.

Bishop v. Piller, 637 A.2d 976, 978-79 (Pa. 1994) (internal footnote omitted). As ably recognized by one of our sister states:

> Moreover, the importance of the grandparent-grandchild relationship in the lives of children has been confirmed. *See* [Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds,* 34 Family Relations 343,] 346-47 [(1985)] (describing studies by Baranowski, Kornhaber and Woodward, and Mead in support of that contention).

> The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship is exempt from the psycho-emotional intensity and responsibility that exists in parent/child relationships. The love, nurturance, and acceptance which grandchildren have found in the grandparent/grandchild relationship confers a natural form of social immunity on children that they cannot get from any other person or institution.
>
> Commentators have suggested that, in the absence of a grandparent/grandchild relationship, children experience a deprivation of nurturance, support, and emotional security. Indeed, Kornhaber and Woodward posited that the complete emotional well-being of children requires that they have a direct, and not merely derived, link with their grandparents. Mead advanced the notion that when an individual does not have intergenerational family relationships there is a resulting lack of cultural and historical sense of self.

Moriarty v. Bradt, 827 A.2d 203, 210-11 (N.J. 2003) (internal citations and quotation marks omitted).

Indeed, the decisional law makes it clear that such a benefit is not limited to the parent-child nuclear family. For example, in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), the Supreme Court invalidated an ordinance limiting occupancy in a dwelling to certain members of a family unit as it applied to a grandmother living in her home with her two grandsons, who were cousins and not siblings. In his plurality opinion, Justice Powell argued that the *Yoder, Meyer*, and *Pierce* line of cases applied to extended family relationships, even though those decisions had not involved such associations. Extolling the virtues of the extended family, Justice Powell stated:

> [M]illions of our citizens have grown up in just such an environment, and most, surely, have profited from it.

> Even . . . a decline in extended family households . . . [has] not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home.... Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 504-05.

In *Commonwealth ex rel. Spriggs v. Carson,* 368 A.2d 635, 640 (Pa. 1977), where we overruled the "tender years" presumption that custody should be awarded to mothers rather than fathers, we stated: "Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of 'presumptions'. Instead, we believe that [our] courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the Court." I believe that the same reasoning should apply where the custody dispute is between parents and third parties.

The General Assembly has directed the focus of the grandparent custody and visitation statute to the fundamental right of the best interests of the child. The courts of the Commonwealth have routinely focused on the best interests of the child in custody and visitation cases, while still recognizing the fundamental right of parents to raise the child. *See Bishop*; *Ellerbe v. Hooks*, 416 A.2d 512 (Pa. 1980); *Zaffarano; Miller v. Miller,* 478 A.2d 451 (Pa. Super. 1984); etc. Pursuant to the Pennsylvania Constitution, the child has a fundamental right to have his or her best interests considered. In balancing the fundamental rights of parents and children, there is no single overriding factor; rather, courts should

consider every fact relevant to the physical, emotional, intellectual, moral, and spiritual well-being of a child. Parenthood, though not paramount, will always be a factor of significant weight.

Child's Best Interests

Courts should consider all relevant factors and specific circumstances of the actual parties involved. Therefore, in determining a child's best interests, the trial judge may consider such factors as: (1) the amount of disruption extensive visitation would cause in the child's life; (2) the suitability of the grandparents' home with respect to the amount of supervision received by the child; (3) the emotional ties between the child and the grandparents; (4) the moral fitness of the grandparents; (5) the distance between the child's home and the grandparents' home; (6) the potential for the grandparents to undermine the parent's general disciplining of the child as a result of visitation; (7) whether the grandparents are employed and the responsibilities associated with such employment; (8) the amount of hostility that exists between the parent and the grandparents; and (9) the willingness of the grandparents to accept the fundamental concept that the rearing of the child is the parent's responsibility and is not to be interfered with by the grandparents.

In addition, the trial court should determine whether the child's emotional health will benefit from re-establishment of the grandparent-child relationship. Was the grandparent, as in this case, an important resource for the child in coping with the death of the parent? Other factors could include: (1) whether the child's performance in school suffered following the death of the parent; (2) whether the child has interests outside of school and home that would be advanced or supported by grandparent participation; (3) the closeness of the child to other members of the deceased parent's family and the opportunity to maintain that relationship without the

presence of the grandparent in the child's life; and (4) the child's wishes.

Requirement of Harm

Experience has taught us the lesson that the parental relationship is not an infallible guarantee that a parent will provide the care and concern essential to a child's proper development. In such cases, the General Assembly has established guidelines and procedures that permit state-enforced custody only when a child is found delinquent or dependent as defined by law, or in cases of abuse, deprivation, or neglect. Thus, the extreme solution of termination of parental rights rests on a demonstration of unfitness of a parent or upon harm to the child.

At the other end of the custody spectrum is the clash between the child's parents and the inevitable dissolution of the family that attends a custody dispute between husband and wife. These disputes have long been guided by the controlling direction to award custody consistent with the best interests of the child.

The middle ground, where a third party seeks partial custody and where there is no state-enforced custody, does not demand the stringent harm-to-the-child standard for resolution. I believe that it requires the delicate balancing of fundamental rights.

Troxel specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme Court affirmed in *Troxel* is important but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a

decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. *Troxel* goes no further. I am inclined to believe that the *Troxel* plurality would have used stronger language if it thought that parental discretion may *only* be outweighed upon a showing of harm to the child.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. *Troxel v. Granville,* 530 U.S. 57 (2000) (plurality opinion). However, the Pennsylvania statute as the Majority applies it here, responds to that mandate and appropriately protects the father's due process rights. Father received the deference to his due process rights that *Troxel* requires.

Therefore, I cannot adopt the assertion of the Dissent that some showing of harm to the child must be shown before the courts can implement the Act. That contention ignores the state's legitimate interest in the welfare of the child.

Conclusion

Legal proceedings immutably alter children's lives; when this occurs, their interests must be paramount for they cannot protect themselves. We strictly construe the application of parental rights statutes because of the tension between the fundamental liberty of familial association and the compelling state interest in protecting the welfare of children. I am convinced that this compelling state interest is grounded on the fundamental right of the child to have his or her best interests considered. It is also based on the state's *parens patriae* responsibility, which tips the balance of the fundamental rights of parent and child in favor of the fundamental right of the child. Those competing interests are no less compelling when the conflict involves an interest asserted by a grandparent.

Our decision here must perforce be guided by our duty to promote sound public policy and preservation of rights. In the

current state of our society, we should interpret the laws of our Commonwealth in such a way that adheres to the mandates of our legislature and promotes the best interests of children in stable families, immediate or extended, that can provide nurturing and supportive homes. Our legislature has spoken on the rights of grandparents to visitation and partial custody of their grandchildren under limited conditions. Our duty is to implement the law accordingly.

Because grandparent visitation is temporary and occasional, the resulting intrusion upon parental authority is minimal. By all accounts, the father in this case has a very close relationship with his son and I cannot see that this child's spending a reasonable amount of time with his grandmother will adversely affect his relationship with his father. Grandparent visitation is a social policy issue more appropriately left to the General Assembly, which has the ability to hold public hearings and debates, to examine the issue, and to draft appropriate legislation addressing the rights and balancing the interests of the various parties involved. That is precisely what the Legislature did in enacting the grandparent custody and visitation statute.

* * * * *

Chief Justice CAPPY dissenting.

In my view, the trial court unconstitutionally applied Pennsylvania's grandparent partial custody and visitation statute, 23 Pa.C.S. § 5311, in this matter. I, therefore, respectfully dissent.

I begin by noting three principles espoused by the Majority with which I agree. First, under the Due Process Clause, parents do enjoy the constitutionally protected fundamental right to make decisions concerning the care, custody, and control of their children. *See* Majority Opinion at 885. Second, because the trial court infringed upon Appellant Shane Fausey's ("Father") fundamental right to

make decisions concerning the custody of his son Kaelen, the trial count's actions taken pursuant to 23 Pa.C.S. § 5311 must survive strict scrutiny. *Cf. id.* at 885. Third and lastly, in order for the trial court's actions taken pursuant to Section 5311 to survive strict scrutiny, its actions must promote a compelling state interest and be narrowly tailored to effectuate that interest. *See id.* Unlike the Majority, these principles lead me to conclude that the trial court unconstitutionally applied Section 5311 in this matter.

The state undoubtedly has a compelling interest in protecting the health and emotional welfare of children. That said, unless a court finds that a fit parent's decisions regarding a child's contact with a grandparent is causing or will cause harm to the child, the state's interest in protecting the child's welfare is not implicated.

Here, the trial court did not determine that Father's decisions regarding Kaelen's contact with Ms. Hiller were harming or would harm Kaelen's welfare, and thus, the state's compelling interest in protecting Kaelen's welfare was not implicated. Rather, the court found Father to be a fit parent but nevertheless concluded that Ms. Hiller presented sufficient evidence to rebut the presumption that Father's decisions regarding Kaelen's contact with Ms. Hiller are in Kaelen's best interest and, based on this finding, granted Ms. Hiller partial custody.[1] By acting in this manner, the court supplanted Father's constitutionally protected decision to limit or preclude contact between Kaelen and Ms. Hiller. In place of Father's constitutionally protected decisions, the court injected its and Ms. Hiller's ideas of Kaelen's best

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[1] I note that the trial court did not state what evidentiary standard of proof it applied in determining that Ms. Hiller sufficiently rebutted this presumption. Other than mentioning that the trial court gave "special weight" to Father's decision regarding Kaelen's contact with Ms. Hiller, the Majority does not address this apparent error. Moreover, in my view, the Majority does not fully explain what "special weight" is in this context or how a court is to give "special weight" to a parent's decisions.

interests. The state simply has no compelling interest to interfere with a fit parent's fundamental right to make decisions regarding a child's contact with a grandparent simply because the grandparent or anyone else, including a state court, thinks that a different decision is better or more desirable for the child. *See Troxel v. Granville,* 530 U.S. 57, 72-73 (2000) (plurality) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."). Because the state had no compelling interest in interfering with Father's decisions regarding Kaelen's contact with Ms. Hiller, the trial court's application of 23 Pa.C.S. § 5311 does not survive strict scrutiny.[2]

In my view, due process requires that a court must make a threshold finding that a fit parent's decisions concerning his or her child's contact with a grandparent are causing or will cause the child harm before the court can infringe upon these constitutionally protected decisions. I would place the burden of proving such harm on the grandparent. Given the fundamental nature of the constitutional right involved in these types of cases and the presumption that a fit parent acts in the best interest of his or her child, *see Troxel,* 530 U.S. at 68, I would require a grandparent to demonstrate, by clear and convincing evidence, that absent an order granting the grandparent custody and/or visitation, the child is being or

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[2] Because I believe that no compelling state interest is implicated in this matter, I need not express my thoughts as to whether the trial court order is narrowly tailored. I, however, respectfully note my disagreement with the Majority's scrutiny under the narrowly tailored prong of its analysis. Most importantly, this is an "as applied" constitutional challenge and not a "facial" constitutional challenge. Therefore, the proper focus of our scrutiny should be on whether the Commonwealth's action taken pursuant to 23 Pa.C.S. § 5311—i.e., the trial court order—is narrowly tailored to promote the state's compelling interest. Our focus should not be on whether Section 5311 is, itself, narrowly tailored. *See, e.g.,* Majority Opinion at 887.

will be harmed. *See Santosky v. Kramer,* 455 U.S. 745, 754-57 (1982) (discussing standards of proof, and stating, among other things, that the clear and convincing evidence standard is appropriate "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money' "). If a grandparent is able to meet this standard of proof, then the trial court must craft an order that is narrowly tailored to protect the welfare of the child. Only then is a court's infringement upon a fit parent's right to make decisions regarding his or her child's contact with a grandparent constitutional.[3]

Lastly, I wish to express that I am not insensitive to Ms. Hiller's wish to foster her relationship with Kaelen. Under the circumstances presented in this matter, however, the Constitution of the United States protects Father's decisions concerning Kaelen's contact with her. In this vein, I find the following thoughts shared by Justice O'Connor in her plurality opinion in *Troxel* to be pertinent:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.

Troxel, 530 U.S. at 70.

For these reasons, I would reverse the order of the Superior Court.

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[3] I find it important to note that, in my view, this construct promotes the best interest of the child. On the one hand, if a grandparent is unable to demonstrate harm in cases such as this, the court may not interfere with the parent's decisions. What is left is a fit parent who is presumed to act in the child's best interests. On the other hand, if a grandparent adequately demonstrates harm, then the court is left with the task of drafting an order which is narrowly tailored to protect the welfare of the child. Such an order, by its very nature, promotes the best interest of the child.

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

J-A06045-04
No. 1428 MDA 2003
2004 Pa. Super. 186

SHANE FAUSEY,

Appellant,

versus

CHERYL HILLER

Appellee.

Appeal from the Order dated August 1, 2003 in the Court of Common Pleas of Lycoming County CIVIL at No. 03-20, 361

Before: LALLY-GREEN, GANTMAN and CAVANAUGH, JJ.

OPINION BY CAVANAUGH, J.

¶ 1 Appellant (father) appeals the August 1, 2003 order granting appellee, maternal grandmother (grandmother), partial physical custody of minor, Kaelen Fausey (born October 5, 1994), under the Grandparents' Visitation Act, 23 Pa.C.S.A. §§ 5311-5314. We affirm.

¶ 2 Kaelen's mother died of cancer on May 25, 2002, when Kaelen was seven years old. Father and mother were married until mother's death. Grandmother and Kaelen had a great deal of contact before the death of Kaelen's mother, and during the final two years before her death, their contact was almost daily. They shared a very close relationship through which grandmother helped to emotionally prepare Kaelen for his mother's death. The regular contact between Kaelen and appellee ended when Kaelen's mother died. The trial court found that appellee had made numerous attempts to obtain visits with Kaelen, but that appellant was not cooperative.

¶ 3 Grandmother sought partial custody and visitation rights under 23 Pa.C.S.A. § 5311. The trial court concluded that without a court order, Kaelen would have little or no contact with grandmother because of the following findings: 1) Father didn't foster visits before grandmother filed the custody petition; 2) Father's position on how much, if any contact is appropriate has been inconsistent; 3) Father's negative feelings toward grandmother interfere with his ability to make good decisions regarding Kaelen's contact with her; 4) Father alleges that grandmother is a threat to Kaelen's safety due to a history of alcohol abuse, domestic violence and the fact that her husband has Hepatitis C; and 5) Father alleges that spending time with grandmother would interfere in his father-son relationship with Kaelen because of the animosity between father and grandmother. Despite the court's recognition that father genuinely cares for his son, it found that the safety concerns he raised did not pose a meaningful threat to Kaelen, and that father was unlikely to allow Kaelen to spend time with grandmother absent a court order.

¶ 4 By order of court dated August 1, 2003, grandmother was granted one weekend of partial physical custody each month from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday, as well as one week each summer.

¶ 5 Appellant raises the following two issues on appeal:

> 1. DID THE TRIAL COURT'S ORDER OF AUGUST 1, 2003 RESULT IN AN UNCONSTITUTIONAL INFRINGEMENT ON MR. FAUSEY'S FUNDAMENTAL LIBERTY RIGHT TO MAKE CHILD REARING DECISIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> 2. DOES THE PENNSYLVANIA GRANDPARENT ACT, 23 Pa.C.S.A. 5311 AND 5312 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FOR IT TREATS CHILDREN OF SINGLE PARENTS AND THOSE OF MARRIED PARENTS UNEQUALLY WITHOUT THERE BEING A SUFFICIENT GOVERNMENT INTEREST TO INTERFERE IN THE RIGHTS OF A SINGLE PARENT?

¶ 6 We first address the constitutionality of 23 Pa.C.S.A. § 5311 with regard to the due process clause and then with regard to the equal protection clause. Because § 5312 is not implicated by this case, we will not consider it. The portion of the statute in question provides:

> § 5311. When parent deceased
>
> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or

> grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S.A. § 5311. This court has stated our standard for reviewing the constitutionality of a statute as follows:

> [W]e note that properly enacted statutes enjoy a strong presumption of constitutionality. *Commonwealth v. Miller,* 455 Pa. Super. 534, 689 A.2d 238 (Pa. Super. 1997). Our standard of review is limited to a consideration of whether the legislation at issue is clearly, palpably, and plainly in violation of the constitution. *Commonwealth v. Swinehart,* 541 Pa. 500, 664 A.2d 957 (Pa. [ ] 1995).

In re C.C.J., 799 A.2d 116, 122 (Pa. Super. 2002).

¶ 7 Our Supreme Court recently set forth the following:

> When confronted with a constitutional challenge premised upon substantive due process grounds, the threshold inquiry is whether the challenged statute purports to restrict or regulate a constitutionally protected right. *Commonwealth v. Burnsworth,* 543 Pa. 18, 669 A.2d 883, 889 (Pa. 1995). If the statute restricts a fundamental right, it must be examined under strict scrutiny. *Smith v. Coyne,* 555 Pa. 21, 722 A.2d 1022, 1025 (Pa. 1999). Pursuant to that analysis, legislation that significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose. *Nixon* [*v. Commonwealth*], 839 A.2d 277, 2003 WL 23095675 at *5; *Commonwealth v. Robinson,* 497 Pa. 49, 438 A.2d 964 (Pa. 1981), appeal dismissed, 457 U.S. 1101, 73 L.Ed.2d 1310 (1982).

Khan v. State Bd. of Auctioneer Examiners, 842 A.2d 936, 947 (Pa. 2004).

¶ 8 The United States Supreme Court has stated that the right of parents to make decisions about the upbringing of their children is a fundamental right. "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 67 (2000). Accordingly, we employ a strict scrutiny analysis to determine if § 5311 is necessary to promote a compelling state interest and is narrowly tailored to effectuate that purpose. *See Khan,* 842 A.2d at 947.

¶ 9 Appellant's argument relies heavily on the United States Supreme Court decision in *Troxel v. Granville, supra,* for the proposition that the application of § 5311 to this case violates the due process clause. The *Troxel* court found that a particular application of a very broad Washington state third-party visitation statute violated a mother's due process rights to make decisions regarding her children.[1] This court recently addressed the applicability of *Troxel* to § 5311 of Pennsylvania's Grandparent Visitation Act, as follows:

> In *Troxel* the Supreme Court found the application of a Washington state statute permitting "any person" to petition for visitation impermissibly broad and found that, under the facts of that case, it unconstitutionally infringed on the fundamental right of the parent to make decisions concerning her child. However, the *Troxel* Court cited with approval statutes comparable to 23 Pa.C.S. § 5311 ["When parent deceased"], which do not contain the broad, sweeping language like that in the Washington statute. Moreover, the *Troxel* Court determined the trial court erred by placing the burden on the parent to disprove that the best interests of the child would be served by granting visitation with grandparents. Here, we emphasize

[1] It is worth noting that the Washington statute was invalidated only as applied, and not on its face.

> it is the grandparents' burden to demonstrate partial custody or visitation is in the best interest of the children and will not interfere with the parent-child relationship.

Douglas v. Wright, 801 A.2d 586, 590-91, n. 1 (Pa. Super. 2002).

¶ 10 As noted by this court in *Douglas,* the Washington statute at issue in *Troxel* is readily distinguishable from the Pennsylvania statute under consideration. In *Troxel,* the U.S. Supreme Court explained:

> Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*any person* may petition the court for visitation rights *at any time,*" and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.*" § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best

> interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, e.g., 137 Wash.2d at 5, 969 P.2d at 23 ("[The statute] allows any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); id. at 20, 969 P.2d at 30 ("[The statute] allows 'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child").

Troxel v. Granville, 530 U.S. 57, 67 (2000).

¶ 11 By contrast, and as aptly explained in the trial court opinion, § 5311 is far more narrowly tailored than the Washington statute invalidated by *Troxel:*

> In summary, the *Troxel* court found three defects in the Washington statute and its application by the courts: The statute was "breathtakingly broad," a presumption was given in favor of the grandparents, and the trial court made slender findings in support of its decision. By contrast, the Pennsylvania statute at issue and its application do not suffer from defects contained in the Washington case.
>
> Section [5311] places limits on the persons who may petition: grandparents and great-grandparents. It also specifies under what circumstances the petition may be filed: a parent of the grandchild must be deceased. It also states when the petition may be granted: the partial custody or visitation must be in the best interest of the child, and the partial custody or visitation must not interfere with the parent-child relationship. Moreover, by placing the burden upon the petitioning grandparents to show that partial custody or visitation is in the best interest of the children and will not interfere with the

> parent-child relationship, Pennsylvania courts give deference to the parent's decision.
>
> And finally, § [5311] requires the court to consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the filing of the petition.

Trial Court Opinion at 10-11.

¶ 12 Importantly, the *Troxel* court deliberately explained the limited scope of its decision by stating:

> [W]e rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case[.] ... We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 198 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. n1 ...
> n1 All 50 States have statutes that provide for grandparent visitation in some form...

Troxel v. Granville, 530 U.S. 57, 73-74 (U.S. 2000). We agree with the trial court that the overly broad terms of the Washington statute addressed by the *Troxel* court do not similarly encumber § 5311, which is markedly more narrow than the Washington statute and does not violate father's due process rights as applied in this case, and further discussed *infra.*

¶ 13 We also find no violation of the equal protection clause in § 5311. Our Supreme Court has set forth the following:

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation.

Curtis v. Kline, 666 A.2d 265, 267-68 (Pa. 1995) (citations omitted).

¶ 14 To the extent that § 5311 treats children who have lost a parent to death differently than children who have not, it is for the justified and reasonable purpose of protecting a child's emotional well-being and accounting for the potentially different needs of a child whose parent has died. Our supreme court has put forth the following regarding the policy purposes behind this statute:

> In the statute's declaration of policy, 23 P.S.[C.A.] § 5301, the "General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights

> and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated." ... Section 5311 would come into play when one of the partners to the marriage dies while the marriage is intact and ensure that the parents of the deceased partner would not be unreasonably cut off from contact with their grandchildren by their son-in-law or daughter-in-law.

Bishop v. Piller, 637 A.2d 976, 978 (Pa. 1994). We agree with the trial court that:

> [E]ven under a strict scrutiny analysis, interpreting the statute to implicate the parents' fundamental right to make decisions regarding their children, § [5311] would still pass muster. The compelling purpose behind § [5311], as stated earlier, is to foster the emotional welfare of children. It is a remedy to protect children from an unwise decision by a parent to cut off meaningful and beneficial contact with a grandparent or great grandparent. The statute treats children from intact families different[ly] from children who have experienced the death of a parent. That classification makes perfect sense because it is precisely in those cases where the danger of alienation from a grandparent is greatest. Children from intact families have two parents, either of which may promote grandparent contact. When one parent is deceased, the chance of the living parent cutting off contact with a grandparent--especially with a parent of the deceased parent--is heightened. Therefore, those children need greater protection.

Trial Court Opinion at 17. To this we would add that a child has a natural right to share in the heritage of each of his parents, and § 5311 fosters preservation of this familial right.

¶ 15 As previously noted, properly enacted statutes enjoy a presumption of constitutionality and may be invalidated only

if clearly, palpably and plainly in violation of the constitution. *In re C.C.J.*, 799 A.2d at 122. Section 5311 does not approach these criteria. Having found § 5311 constitutional, we briefly turn to appellant's complaint that this specific application of the statute violated his rights and that the trial court abused its discretion in rendering the custody award.

¶ 16 The trial court properly accorded father, as a fit parent, the presumption that his decisions regarding Kaelen's visits with grandmother were in Kaelen's best interest. Nevertheless, the trial court found that grandmother overcame that presumption and met her burden of showing: 1) that partial custody would be in Kaelen's best interest; and 2) that partial custody would not interfere with the parent-child relationship. The court concluded that Kaelen's best interests would be served by granting partial custody to grandmother because of the following findings:

> Kaelen has a long-standing, very close relationship with Mrs. Hiller. He enjoys being at her home, and often does not want to leave when the visits are over. Mrs. Hiller is a warm, loving grandmother who spends her time with Kaelen doing things such as having picnics, gardening, swimming, playing games, and Kaelen's all-time favorite activity: going to the car races to see his uncle race. She also has family get-togethers on one or both days of her visit each month, which gives Kaelen the opportunity to play with his numerous cousins, second cousins, and other members of the maternal side of his family. Kaelen also is able to spend a significant amount of time with his great-grandfather, Jack Braim, who has always been an important person in Kaelen's life. And finally, when Kaelen is with Mrs. Hiller, he seeks and receives emotional support regarding the death of his mother, as described by Mrs. Hiller ... Mr. Fausey himself expressed concerns regarding Kaelen's inability to express his emotions regarding his mother's death. It appears that contact with his mother's side of the family is highly

beneficial emotionally for Kaelen in helping him deal with the loss of his mother.

Trial Court Opinion at 6.

¶ 17 The court also found no evidence that grandmother's partial custody would interfere with the parent-child relationship or be detrimental to Kaelen in any way. *Id.* at 8.

¶ 18 "On issues of credibility and weight of the evidence, an appellate court defers to the findings of the trial judge, who has had the opportunity to observe the proceedings and the demeanor of the witnesses." *L.F.F. v. P.R.F.*, 828 A.2d 1148, 1152 (Pa. Super. 2003). The trial court's findings are supported by the record and we accordingly defer to those findings and find that the court properly applied the law to the facts of this case.

¶ 19 In accordance with our standard of review, we find 23 Pa.C.S.A. § 5311 to be constitutional and we do not find that the August 1, 2003 order granting partial custody to maternal grandmother is violative of father's constitutional rights or manifestly unreasonable. Accordingly, we affirm the order granting partial custody to grandmother.

¶ 20 Order affirmed.

¶ 21 Judge Lally-Green concurs in the result.

APPENDIX C

COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PA

No. 03-20,361

CHERYL HILLER,

Plaintiff,

versus

SHANE FAUSEY

Defendant.

OPINION
Issued Pursuant to Pa. R.A.P. 1925(a)

The defendant, Mr. Fausey, has appealed this court's order of August 1, 2003 granting partial physical custody of Kaelen Fausey to Cheryl Hiller. Mr. Fausey is the father of Kaelen Fausey, who was born on October 5, 1994. Mrs. Hiller is the child's maternal grandmother. The mother, Stephanie Fausey, died of cancer on May 25, 2002.

A two-day trial was held, during which Mr. Fausey hotly contested Mrs. Hiller's request for one weekend of custody each month, and especially oversights. Mr. Fausey raised several specific concerns regarding Mrs. Hiller, all of which the court found to be without merit. On the contrary, the court

finds that Mrs. Hiller is a loving grandmother, who merely wants to continue the close relationship she developed with Kaelen before the mother's death, and that it is in Kaelen's best interest to continue this relationship.

Mr. Fausey claims the statute permitting grandparent visitation, 23 P.S.A. §5311, is unconstitutional. The court finds no merit in his arguments. The statute violates neither the Due Process Clause nor the Equal Protection Clause Instead, it is a carefully drafted statute which perfectly balances the rights of parents against the compelling state interest to ensure the welfare of children.

At the conclusion of the two-day custody trial, this court granted Mrs. Hiller one weekend of partial physical custody each month, from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday, and one week each summer. This decision was made after close consideration of the statute at issue, 23 Pa.C.S.A. §5311, which states as follows:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

The burden is on the grandparent to prove that partial custody or visitation is in the child's best interest and will not interfere with the parent-child relationship. *Douglas v. Douglas*, 801 A.2d 586 (Pa. Super. 2002). Additionally, a fit parent's decision regarding visitation or partial custody is presumed to be in the best interest of the child. *Troxel v. Granville*, 530 U.S. 57, 69 (2000). Thus a grandparent seeking visitation or partial custody has the burden of

rebutting the presumption t' .. a decision made by a fit parent to deny or limit visitatio was made in the child's best interest.

Regarding contact, b ore Mrs. Hiller's petition was filed, the court found that K elen and Mrs. Hiller had a great deal of contact before the r. ther's death. This contact intensified in the last two years be re Mrs. Fausey's death, with Kaelen visiting Mrs. Hiller on almost daily basis. This was established by the testimony of Mrs. Hiller, whom the court found very credible, as wel as the testimony of several neighbors and family members who saw Kaelen at Mrs. Hiller's home almost daily, and whom the court found credible on this issue. Mrs. Hiller and other members of her family made themselves available for Mrs. Fausey throughout her prolonged illness especially during the year prior to her death, when they supported her in numerous ways. Mrs. Fausey and her father, Jack Braim, transported Kaelen to and from school, babysat him when Mrs. Fausey was too ill to care for him or was obtaining medical treatment, and took her to medical appointments. The testimony also established that Mrs. Hiller and Kaelen had an extremely close relationship. Mrs. Fausey helped prepare Kaelen emotionally for his mother's death. N.T., p. 140. Kaelen loved being with Mrs. Hiller, and the two showed a great deal of affection toward one another.

The frequent contact between them stopped abruptly after Mrs. Fausey's death. From the time of her death until the court-ordered visits began, Mrs. Hiller saw Kaelen only three times: Once by accident, when Kaelen was visiting Jack Braim, his maternal great-grandfather, and Mrs. Hiller happened to stop by. The second time was when she attended Kaelen's birthday party at Jack Braim's residence. The third time was on Christmas 2002, when the child was brought to the home of Mike Dunlap, a relative. None of the instances were at Mrs. Hiller's home. The court finds the testimony of Mrs. Hiller credible regarding her numerous attempts to have

Kaelen come to her home for a visit. Mrs. Hiller testified that when she left messages on Mr. Fausey's answering machine, they were not returned. When she reached Mr. Fausey by telephone he denied her requests, stating that he had plans. In light of Mr. Fausey's serious concerns about Mrs. Hiller which he expressed at the hearing, the court has no difficulty believing he did not permit Kaelen to go to Ms. Fausey's residence for visits and would not permit it now without a court order.

The *Troxel* case requires a court to give some weight to the fact that a parent has permitted some visitation or partial custody. *Troxel*, 530 U.S. at 71. The significance of this factor is that once a parent agrees to some contact, the dispute is no longer over whether the grandparent will have any access to the child, but merely over how much contact will occur.

It is difficult to determine exactly how much contact Mr. Fausey agrees to at this point. Throughout the history of this case, Mr. Fausey's position has vacillated considerably regarding the nature and amount of contact which should be permitted between Mrs. Hiller and Kaelen. After a custody conference held on April 10, 2003, the Custody Conference Officer entered an order indicating the parties had agreed to all provisions of the order except overnight visitation. A hearing was scheduled before this court for the sole purpose of determining whether overnight custody should be granted. However, over a month after the conference was held, Mr. Fausey filed a Petition for Modification of Custody, maintaining that he did not agree to any of the provisions of the order, and asking the court to deny any court ordered visitation.[1] In his custody pretrial memorandum, Mr. Fausey stated his position as, "There should be no court ordered

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[1] The petition was filed by an attorney different from the attorney who was present at the custody conference.

visitation for Plaintiff." At the trial, Mr. Fausey testified that he would allow Mrs. Hiller to have one day per month with Kaelen, with no overnight stays.

It appears, although it is not clear to this court, that Mr. Fausey opposes any court ordered visitation. He wants the decision regarding whether and when Kaelen visits Mrs. Hiller to be entirely at his discretion. The court believes, however, that without a court order, Kaelen would have little if any contact with Mrs. Hiller. Our conclusion on this issue is based upon five findings. First is Mr. Hiller's past conduct. As discussed above, Mr. Fausey did not permit Kaelen to visit Mrs. Hiller at her residence before Mrs. Hiller filed the custody petition. Second, also as discussed above, Mr. Fausey has been dishonest—or, at the very least, highly inconsistent—about his position with regard to grandparent contact throughout the proceedings.

Third, Mr. Fausey has extremely negative feelings toward Mrs. Hiller, which the court believes interferes with his ability to make good decisions regarding Kaelen's contact with her. Mr. Fausey's own testimony demonstrated that he allows his personal feelings to cloud over his judgment regarding Kaelen's contact with his family. For instance, all parties agreed that Kaelen and Jack Braim, the maternal great-grandfather, have an extremely close relationship, and in fact Mr. Fausey ensured the two remained in frequent contact after Mrs. Fausey's death. However, Mr. Fausey became perturbed at Mr. Braim throughout the course of the custody proceedings, and testified that he no longer trusted him. Upon being questioned by the court, it was clear that Mr. Fausey's mistrust of Mr. Braim involved only the personal relationship between the two men, and had nothing to do with the relationship between Kaelen and Mr. Braim. However, Mr. Fausey clearly was allowing his anger toward Mr. Braim to interfere with Kaelen's relationship with Mr. Braim. N.T., p. 32-34.

Fourth, Mr. Fausey has attempted to convince the court that Mrs. Hiller is a threat to Kaelen's safety, despite overwhelming 'dence to the contrary. Mr. Fausey raised several concer bout Mrs. Hiller in a futile attempt to convince the court Kaelen would be in danger if left in her care. Mr. Fausey doggedly insisted that Mrs. Hiller has a history of severe alcohol abuse, provides inadequate supervision resulting in serious risk of injury for the child, has a significant history of domestic violence in her household, and that her husband's Hepatitis C could be harmful to the child's health. The court found no credible evidence to support any of these claims. All of them were completely without merit, and are discussed in the court's statement to the parties, N.T. p. 311. Given the fact that none of these concerns have any merit whatsoever, the court must conclude that either Mr. Fausey is grasping at straws and inventing reasons to keep Kaelen away from his grandmother, or he actually believes the allegations, which shows he is under serious delusions concerning Mrs. Hiller and his judgment regarding her is polluted. Under either scenario, the result is the same: Mr. Fausey would not permit this grandmother and grandchild to continue the close relationship they have developed.

The court firmly believes that granting Mrs. Hiller partial custody rights is in Kaelen's best interest. One day per month, from 10:00 a.m. until 6:00 p.m., as Mr. Fausey has recently stated would be acceptable, is not enough time to maintain the bond Kaelen has established with his grandmother and her side of the family, especially given the extensive contact in the past. Kaelen has a long-standing, very close relationship with Mrs. Hiller. He enjoys being at her home, and often does not want to leave when the visits are over. Mrs. Hiller is a warm, loving grandmother who spends her time with Kaelen doing things such as having picnics, gardening, swimming, playing games, and Kaelen's all-time favorite activity: going to the car races to see his uncle race. She also has family get-togethers on one or both days of her visit each month, which

gives Kaelen the opportunity to play with his numerous cousins, second cousins, and other members of the maternal side of his family. Kaelen also is able to spend a significant amount of time with his great-grandfather, Jack Braim, who has always been an important person in Kaelen's life. And finally, when Kaelen is with Mrs. Hiller he seeks and receives emotional support regarding the death of his mother, as described by Mrs. Hiller:

> Well there are a lot of things. Like he will ask me different questions about his mom. We can visit the grave. Different things that I can help him, kind of comfort him with. And he will ask me, Meem do you remember when my mom used to—yes. And we just converse and, you know, things, bonding, you know, certain bonding with the family. And it makes him feel good, you know, when we talk about his mom. It is just like his little eyes light right up and different things. I just think it's wonderful thing, you know. It's bad, I lost my daughter. But I want to continue with him for him to understand, you know, where he comes from and family.

N.T. pp. 154-155. Mr. Fausey himself expressed concerns regarding Kaelen's inability to express his emotions regarding his mother's death. N.T., p. 277. It appears that contact with his mother's side of the family is highly beneficial emotionally for Kaelen in helping him deal with the loss of his mother.

Mr. Fausey also claimed that if Kaelen spent time with his grandmother it would interfere with the parent-child relationship, due primarily to the animosity between himself and Mrs. Hiller. If the mere existence of animosity and dislike between parent and grandparent were enough to prevent grandparent custody, surely there would be very few court-ordered periods of grandparent custody. For after all, if the parties were able to get along together, they would not be in court to begin with. What must exist to prevent partial

custody is evidence the hostility will somehow be detrimental to the child or interfere with the parent-child relationship.

In fact, the appellate courts have granted grandparent custody or visitation in cases where the animosity between the parties was much greater than that existing between the parties is much greater than that existing between Mr. Fausey and Mrs. Hiller. In *Bucci v. Bucci*, 506 A.2d 438 (Pa. Super. 1986), the Superior Court permitted the paternal grandparents to have partial physical custody despite bitterness, resentment, and hatred between the mother and the grandparents, and a long history of hostility. The trial court found that the parties' more temperate behavior would prevail during the visits, and the Superior Court affirmed the trial court's assessment. *See also Douglas v. Wright*, 801 A.2d 586 (Pa. Super. 2002). The resentment, hostility, and hatred exhibited by the parents and grandparents in the above-cited cases are far greater than that existing between Mr. Fausey and Mrs. Hiller.

Mr. Fausey points to the case of *Rigler v. Treen*, 660 A.2d 111 (Pa. Super. 1995), in which the court denied grandparent custody or visitation. In *Rigler*, however, the court found, based upon the testimony of the mother, the mother's husband, and the mother's expert psychological witness, that visits with the paternal grandparents interfered with the mother's parenting ability and caused distress to the child himself. This was due largely to the negative effects of the grandmother's domineering personality upon the mother. This was not a hypothetical fear. Rather, the evidence showed the visits had caused a present, actual effect upon the child's immediate family, as well as a negative effect on the mother's relationship with the child.

In the case before this court, there was no evidence Mrs. Hiller's partial custody would interfere with the parent-child relationship or be detrimental to Kaelen in any manner. Mrs. Hiller's testimony demonstrated to this court's complete

satisfaction that despite her hard feelings toward Mr. Fausey—understandably exasperated by the litigation and the thousands of dollars she was forced to spend in order to see her grandchild—she will not express any negative feelings about him in front of Kaelen, nor will she create a situation which would have a negative emotional impact upon the child. Similarly, despite whatever harsh comments the court has for Mr. Fausey's conduct regarding Mrs. Hiller's partial custody, it is clear Mr. Fausey loves his son and is a capable father. The court rests assured that Mr. Fausey will not let has hostility and dislike for Mrs. Hiller cause Kaelen emotional harm. In short, the court finds that both parties will behave in a civil manner during the exchanges and will not put Kaelen in the middle of a war zone. There have been no incidents of direct confrontations between Mrs. Hiller and Mr. Fausey in the past, and the court believes it will not happen in the future.

For all these reasons, the court found Mrs. Hiller met her burden of showing that partial custody would be in Kaelen's best interest, and would not interfere with the parent-child relationship. As a fit parent, Mr. Fausey enjoys a presumption that his decision regarding Kaelen's contact with Mrs. Hiller is in Kaelen's best interest. However, the court finds that Mrs. Hiller has rebutted that presumption.

Constitutional Issues

Mr. Fausey next contends that §2511 violates the United States Constitution in two ways: (1) It violates the Due Process Clause of the Fourteenth Amendment, and (2) It violates the Equal Protection Clause of the Fourteenth Amendment.

We begin by recognizing that under both state and federal law there is a strong presumption that in enacting a statute, the legislature has acted within constitutional bounds. *Commonwealth v. Barud*, 681 A.2d 162 (Pa. 1996); *Harper v. Virginia, Bd. of Elections*, 383 U.S. 663, 670 (1966). All

doubts are to be resolved in favor of sustaining the constitutionality of the legislation. *Commonwealth v. Blystone*, 549 A.2d 81,87 (1998), *affirmed*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990). "Nothing but a clear violation of the Constitution—a clear usurpation of powers prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Glancev v. Casey*, 288 A.2d 812, 817 (1972). Courts are "obliged to exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions" *Commonwealth v. Chilcote*, 578 A.2d 429, 435 (Pa. Super. 1990). In short, the party challenging a statute has a very heavy burden in proving it unconstitutional. The challenging party must prove the act "clearly, palpably and plainly" violates the constitution. *Barud, supra.*

Due Process Clause

Mr. Fausey bases his argument chiefly on the United States Supreme Court case of *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, a divided Court struck down a Washington statute which provided that "any person may petition the court for visitation rights at any time" and that "the court may order visitation rights for any person when the visitation may serve the best interest of the child." Justice O'Connor, writing for four of the justices, declined to declare the statute unconstitutional on its face, and instead found the statute unconstitutional as applied.[2] The court held that the statute, as applied to the case at issue, violated the Due Process Clause of the Fourteenth Amendment because it improperly infringed upon the mother's fundamental right to make decisions concerning her children. The bases of the Court's decision were that the statute was "breathtakingly broad," that the state court gave no deference to the mother's decision on the

[2] Chief Justice Rehnquist, Justice Breyer, and Justice Ginsburg joined the opinion. Justices Souter and Thomas concurred, writing separate opinions. Justices Stevens, Scalia, and Kennedy dissented.

matter, and the state court's decision was based upon "slender findings."

The Supreme Court did not rule that any statute granting third-party visitation or custody is unconstitutional. Indeed, it did not even strike the Washington statute as unconstitutional on its face.[3] It merely declared the Washington statute unconstitutional'' as applied to the particular case. Also, the Court explicitly refused to establish standards to be applied to third-party visitation statutes; however, the Supreme Court opinion contrasts the Washington statute to the Minnesota grandparent visitation statute, which is similar to the Pennsylvania grandparent statute. That comparison indicates the Court would look favorably on a statute such as § 2511.

In pointing out the flaws in the Washington statute and its application, Justice O'Connor wrote, "[T]he problem here is not that the Washington [trial court] intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." 530 U.S. at 69. The *Troxel* court also noted that the Washington state courts could have given the broad language of the statute a "narrower reading" according special weight to decision-making by fit parents, but declined to do so. Id at 67-69.

In summary, the *Troxel* court found three defects in the Washington statute and its application by the courts: The statute was "breathtakingly broad," a presumption was given in favor of the grandparents, and the trial court made slender findings in support of its decision.

By contrast, the Pennsylvania statute at issue and its application do not suffer from the defects contained in the Washington case. Section 2511 places limits on the persons who may petition: grandparents and great-grandparents. It also specifies under what circumstances the petition may be

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[3] The Washington Supreme Court had declared the statute to be facially invalid, due to its breadth.

filed: a parent of the grandchild must be deceased. It also states when the petition may be granted: the partial custody or visitation must be in the best interest of the child, and the partial custody or visitation must not interfere with the parent-child relationship. Moreover, by placing the burden upon the petitioning grandparents to show that partial custody or visitation is in the best interest of the children and will not interfere with the parent-child relationship, Pennsylvania courts give deference to the parent's decision.

And finally, § 2511 requires the court to consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the filing of the petition. Contact occurring before the filing of the petition most likely means that at least one parent permitted the contact, and also helps a court determine the best interest issue, since the court can examine whether or not that contact was beneficial to the child and what effect severing the existing emotional bond may have on the child.

We therefore agree with the Pennsylvania Superior Court's recent on the matter:

> We recognize the relatively recent decision of the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and find it readily distinguishable. In *Troxel* the Supreme Court found the application of a Washington state statute permitting "any person" to petition for visitation impermissibly broad and found that, under the facts of that case, it unconstitutionally infringed on the fundamental right of the parent to make decisions concerning her child. However, the *Troxel* Court determined the trial court erred by placing the burden on the parent to disprove that the best interests of the child would be served by granting visitation with grandparents. Here, we emphasize it is the grandparents' burden to demonstrate partial custody or

visitation is in the best interests of the children and will not interfere with the parent-child relationship.

Douglas, *supra*, at 590 n.l. We also acknowledge the recent case of *K.B. II, K.B and B.B. v. C.B.F.*, 2003 Pa. Super. 364, 2003 Pa. Super. LEXIS 3219. That case, which involved a dispute over primary custody, held that the trial court erred in granting the grandparents primary custody when the mother had adequately cared for the child. Although the case did not specifically involve a constitutional challenge, the court found no problem with the statute (§ 5313), so long as courts applied a "weighted best interest" analysis in favor of the parent. Moreover, as that case involved primary physical custody, it stands for the proposition that it is very difficult indeed for a third party to gain primary, physical custody over a parent. It does not speak to grandparent partial custody of the type at issue in this case, which is much less of an intrusion into the family unit.

Mr. Fausey has pointed to the case of *Linder v. Linder*, 72 S.W. 3d 841 (Ark. 2002), in which the Arkansas Supreme Court found the Arkansas Grandparental Visitation Act unconstitutional as applied. The decision was based first upon the court's conclusion that the statute incorporated a procedural preference for granting such rights, which in effect shifted the burden of proof to the parent. That is not the case in Pennsylvania. And second, the court held that the state could show a "compelling interest" warranting intrusion into the parent's decision-making right only if some "special factor" exists to justify state interference, such as an unfit parent or harm to the child. We do not believe *Troxel* mandates such a holding. The discussion of parental fitness in *Troxel* occurred in the context of explaining the presumption that fit parents act in the best interest of their children. Once the parent is fit, the presumption applies. *Troxel* does not stand for the proposition that the presumption cannot be overcome. A presumption, by definition, is a starting point from which to assess the evidence and reach a conclusion. It

gives one party the upper hand; it does not conclusively decide the issue.

A review of other states' decisions indicates that some states have found their grandparent statutes constitutional, some have found their statutes unconstitutional as applied, and some have found their statutes unconstitutional on their face. Of course, each state statute is different, so analyzing these decisions is of limited value. It is important to note, however, that the *Troxel* court explicitly invited state courts to construe their statutes in a manner which would cure the constitutional deficiencies, and some states took the opportunity to do so. For instance, Wisconsin and Indiana merely read into their statute a mandate to give presumptive weight to the parents' decision. See *In re Paternity of Roger D.H.*, 641 N.W. 2d 440 (Wis. 2002); *Crafton v. Gibson*, 752 N.E. 2d 78 (Ind. App. 2001). As noted above, Pennsylvania already places the burden on the grandparents, and this court has additionally accorded Mr. Fausey the presumption that his decision regarding contact with Mrs. Hiller is in Kaelen's best interest.

Obviously, the Constitution does not prohibit all interferences with family autonomy. There are many circumstances in which state intervention is constitutional. Such interferences are usually permitted in order to promote the physical or emotional welfare of children. For instance, a state may require children to be vaccinated, educated, and restrained in a proper car seat while being transported. States also have laws prohibiting neglect and abuse. Even parents' rights to have contact with their own children may be curtailed when that contact harms the child physically or psychologically.

Laws interfering with fundamental rights, such as a parent's right to make decisions concerning his or her child, must be analyzed under the "strict scrutiny" standard: the statute must serve a compelling state interest and be narrowly

tailored to serve that interest. Although the *Troxel* court did not mandate the application of the "strict scrutiny" standard,[4] even if that standard were applied, § 2511 would pass the test. The government has a compelling interest in ensuring the emotional welfare of children. Children who have formed an emotional bond with their grandparents should not have to suffer the trauma of having that bond broken merely because a parent dies. Moreover, few would disagree that in most instances, children benefit in a variety of ways from contact with grandparents and great-grandparents. Through their grandparents, children can acquire a sense of their family's history and can form a better understanding of themselves as a result. The ripened wisdom of a grandparent, gained through the passage of time, can have a profoundly beneficial impact upon children. Intergenerational contact is more important than ever in this unfortunate age of families broken by geographical distance, divorce, separation, imprisonment, and death.

The state also has a strong interest in preserving and strengthening, as much as possible, the family unit. Grandparents and great-grandparents are members of the extended family. They have long been recognized as playing an important role in their children's lives and states have a compelling interest in seeing that children already in broken families are not arbitrarily deprived of the benefit of a loving grandparent.

Pennsylvania has declared its policy of facilitating contact between children and their grandparents in the instances of

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[4] It is arguable that the "rational basis" standard might be more appropriate, because the statute contemplates occasional, temporary visitation or partial custody, and therefore is not a significant encroachment upon the parent's rights. The Indiana Court of Appeals ruled this way in *Sightes v. Barker*, 684 N.E. 3d 224 (Ind. Ct. App. 1997), and declined to change the ruling in *Crafton v Gibson*, 752 N.E.2d 78 (Ind. App. 2001).

divorce, separation, and death of the parents. This policy is clearly set forth at 23 Pa.C.S.A. § 5301:

> The General Assembly declares that it is the public policy of the Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the fights and responsibilities of child rearing by both parents *and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated.*

(italics added.) This is obviously based upon the legislature's judgment that generally children benefit from contact with their grandparents.

In the case of a deceased parent the state has an increased interest in ensuring grandparent partial custody or visitation, because of the greater likelihood the living parent will cut off the parents of the deceased parent. Moreover, children who have recently suffered the loss of a parent should not have to experience the additional loss of a beloved grandparent. Section 2511 was enacted to allow courts in such cases to step in and grant visitation or partial custody despite the opposition of the parent, when such contact is clearly in the best interest of the child.

The purpose behind § 2511 is obvious, as is the need for such a statute. As we all know, it is common for parents to come into conflict with their in-laws and even their own parents. Unfortunately, that conflict and the emotions which result from it sometimes blind a parent and as a result, he or she cannot see the true interests of his or her child. That is exactly what happened in tins case. Mr. Fausey is simply unable to view the situation clearly, objectively, or reasonably, because of his dislike for Mrs. Hiller. If it were up to Mr. Fausey, Kaelen would be prevented from maintaining the close relationship he has developed with his grandmother.

Pennsylvania has a strong interest in protecting children like Kaelen from bad decisions made by parents.

Section § 2511 strikes a perfect balance between arbitrary interference with the rights of parents and the state's interest in promoting grandparent/grandchild contact. Before granting grandparent visitation, courts must carefully consider the best interest of the child, and must give a great deal of deference to the parent's opinion concerning the matter. That is why the Pennsylvania statute places the burden of proving the benefit of visitation upon the grandparents, and why the Troxel court mandates the presumption that a fit parent's decision is in the best interest of the child. It is only after the court finds the grandparents have rebutted that presumption that visitation or partial custody may be granted.

Given the strong state interest in the welfare of children, the limitations guiding the award of grandparent custody or visitation, the presumption in favor of the parent's decision, and the strong presumption of constitutionality of statutes, this court finds that § 2511 does not violate the Due Process Clause on its face, or as applied.

Equal Protection

Mr. Fausey argues that § 5311, § 5312, and § 5313 violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Section § 5312 and § 5312 are not before the court and therefore we cannot and will not address them. As to § 5311, the court finds no violation of the Equal Protection Clause.

The Equal Protection Clause guarantees that like persons in like circumstances will be treated similarly. It does not require that all persons under all circumstances enjoy identical protection under the law. It does not require equal treatment of people having different needs. It does not prohibit a state from classifying individuals for the purpose of receiving different treatment. It only mandates that such

classifications are reasonable rather than arbitrary, and bear a reasonable relationship to the object of the legislation. As summarized by the Pennsylvania Supreme Court, "[A] classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation." *Curtis v. Kline*, 666 A.2d 265, 267-68 (Pa 1995).

When the classification implicates a "suspect" class or a fundamental right, the statute must be strictly construed in light of a "compelling" governmental purpose. *Id.* at 268. If the classification implicates an important though not fundamental right or a sensitive classification, a heightened standard of scrutiny is applied to an important governmental purpose. If the classification involves none of these, the statute is upheld if there is any rational basis for the classification. *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986) (citations omitted).

It is possible that §2511 warrants only a rational basis review, since the statute classifies children by whether or not they are living in an intact family, which is not a suspect or sensitive classification. Moreover, it involves the children's opportunity to have contact with grandparents, which is not a fundamental or important right. It could be argued that this case is similar to that in *Curtis*, *supra* where the Pennsylvania Supreme Court applied a rational basis standard to a statute establishing an action for children from broken families to obtain court-ordered parental financial support for educational costs after the children have reached eighteen years of age. The court found the statute classified children according to the marital status of their parents, and did not involve a fundamental right because individuals were not entitled to financial assistance for college.

However, even under a strict scrutiny analysis, interpreting the statute to implicate the parents' fundamental fight to make decisions regarding their children, § 2511

would still pass muster. The compelling purpose behind § 2511, as stated earlier, is to foster the emotional welfare of children. It is a remedy to protect children from an unwise decision by a parent to cut off meaningful and beneficial contact with a grandparent or great-grandparent The statute treats children from intact families different from children who have experienced the death of a parent. That classification makes perfect sense because it is precisely in those cases where the danger of alienation from a grandparent is greatest. Children from intact families have two parents, either of which may promote grandparent contact. When one parent is deceased, the chance of the living parent cutting off contact with a grandparent—especially with a parent of the deceased parent—is heightened. Therefore, those children need greater protection.

Once again, this case is the perfect example of the statute in action. As long as Mrs. Fausey was alive, Kaelen saw his grandmother on an almost daily basis Without the existence of § 2511, many children like Kaelen would be forced to bear two losses simultaneously: the loss of a parent and the loss of a grandparent. Children in Kaelen's situation are clearly disadvantaged by the death of a parent, and the statute merely attempts to compensate for this disadvantage.

We also note that regarding a parent's right to grant time with a grandparent, a parent of a child whose other parent is deceased is in an entirely different position than a parent of a child whose other parent is alive. Parents in the latter category cannot make an arbitrary, unilateral decision to cut off contact with a grandparent; they must contend with the other parent, who may guarantee such contact despite the wishes of the opposing parent. Parents of children whose other parent is deceased have no other parent to contend with, and therefore have much greater decision-making power in the matter of grandparent contact. It is that difference which justifies treating the parents differently, as well as the children, in cases where one parent has died.

In summary, § 2511 treats children who have suffered the death of one parent differently because they have different needs. This difference justifies the state treating the two classes differently, in order to further the end of promoting children's emotional well-being by ensuring the continuation of a grandparent relationship.. Furthermore, §2511 is narrowly tailored to meet the state's goal. As thoroughly discussed in the prior section of this opinion, the statue and its interpretation guarantees that the state will be overriding the wishes of a parent only when it has been established that the parent's decision is contrary to the child's best interest, and only after applying to the parent the presumption that a parent's decision is in the child's best interest.

BY THE COURT,

Date: 16 Oct 03

/s/
Clinton W. Smith, P.J.

APPENDIX D

COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PA

No. 03-20,361

CHERYL HILLER,

Plaintiff,

versus

SHANE FAUSEY

Defendant.

ORDER

AND NOW, this 1st day of August, 2003, after a custody trial, the following order takes immediate effect and supersedes any prior custody order. This order concerns the child, Kaelen Fausey. The parties are: Cheryl Hiller, the maternal grandmother, and Shane Fausey, the father. It is noted that the mother is deceased.

Cheryl Hiller shall have partial custody as follows:

1. The second weekend of each month, from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday. The second weekend shall be defined as the weekend containing the second Saturday of the month. However, if the second weekend

of the month contains a holiday, the visit shall be moved to the following weekend.

2. Summer:

   A. 2003: From 10:00 a.m. on August 4, 2003 until 7:00 p.m. on August 6, 2003, and also the following weekend, which is Ms. Hiller's regularly scheduled weekend., from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday.

   B. Subsequent Years: Each year, Ms. Hiller may have custody for one week in August, which shall include her weekend that month. The week shall begin at 9:00 a.m. on Monday and shall end at 7:00 p.m. the following Sunday.

3. Both parties may have reasonable telephone contact with the child when he is in the custody of the other party.

4. Ms. Hiller shall have custody at other times, as the parties can agree.

5. Ms. Hiller shall provide all transportation.

6. Ms. Hiller shall not consumer alcoholic beverages eight hours prior to the visits or during the visits.

7. The child is currently enrolled in organized sports. Ms. Hiller shall be responsible for taking the child to all practices and games occurring during her custody time.

BY THE COURT,

/s/

Clinton W. Smith, P.J.

cc: Janice Yaw, Esq.
Randi Dincher, Esq.

APPENDIX E

STATES: GRANDPARENT VISITATION STATUTES AND CASE LAW

States That Do Not Require a Harm Standard Under The Federal Constitution

State	Case Law	Statute
Alaska	*Evans* v. *McTaggard*, 88 P.3d 1078, 1089 (Alaska 2004) ("imposing on the [grandparent] the burden of proving that visitation by the [grandparent] is in the best interests of the child * * * by clear and convincing evidence" satisfies "special weight" given to parents' decisions under *Troxel*)	Alaska Stat. § 25.20.065 (2006) (providing that a grandparent may petition "for an order establishing reasonable rights of visitation * * * if (1) the grandparent has established or attempted to establish ongoing personal contact with the child; and (2) visitation by the grandparent is in the child's best interest")
California	*In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (grandparents "required to overcome a rebuttable presumption that visitation is not in [the child's] best interest")	Cal. Fam. Code Ann. § 3104 (West 2004) (A grandparent may petition for visitation if the court both finds "a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child" and "[b]alances the interest of the child in having visitation against the right of the parents to exercise their parental

State	Case Law	Statute
		authority," subject to a rebuttable presumption that it is not in the child's best interest if the parents object to the visitation)
Colorado	*In re Adoption of C.A.*, 137 P.3d 318, 322 (Colo. 2006) ("[T]he ultimate burden [is] on the grandparents to establish by clear and convincing evidence that the visitation * * * is in the best interests of the child.")	Colo. Rev. Stat. Ann. § 19-1-117(2) (2006) (grandparent may obtain visitation rights "upon a finding that the visitation is in the best interests of the child")
Delaware	*Thomas* v. *Nichols-Jones*, 2006 Del. Lexis 515, *4-*5 (Del. 2006) (upholding application of best interests standard where grandparent bears the burden of proof in light of *Troxel*)	Del. Code Ann. tit. 10, § 1031(7)(a) (1999) (providing "[t]hat when the natural or adoptive parents of the child are cohabitating as husband and wife, grandparental visitation may not be granted over both parents' objection. The trier of fact shall make the ultimate decision based upon the best interest of the child")

State	Case Law	Statute
Kansas	*Dep't of Soc. & Rehab. Servs.* v. *Paillet*, 16 P.3d 962, 971 (Kan. 2001) (requirement that grandparents show only that visitation would be in "the best interests of the child and [that] a substantial relationship [with the child has been] established with the grandparents" satisfies *Troxel*)	Kan. Stat. Ann. § 38-129(a) (2000) (A court may grant reasonable visitation rights to grandparents "upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the grandparent and child has been established.")
Missouri	*Blakely* v. *Blakely*, 83 S.W.3d 537, 545 (Mo. 2002) (*en banc*) (holding that requiring grandparents to "bear the burden of proving that * * * denial of visitation [would be] 'unreasonable' * * * accord[s] the decision of the parents the kind of rebuttable presumption of validity that *Troxel* suggests is appropriate")	Mo. Ann. Stat. § 452.402(2) (West Supp. 2006) (allowing court to award grandparent visitation under certain conditions "when the court finds such visitation to be in the best interest of the child")

State	Case Law	Statute
Nebraska	*Hamit* v. *Hamit*, 715 N.W.2d 512, 528 (Neb. 2006) (holding that awarding grandparents custody under best interests standard does not violate *Troxel* so long as court does not believe that "such visitation would adversely interfere with the parent-child relationship")	Neb. Rev. Stat. Ann. § 43-1802(2) (LexisNexis 2005) (providing that "[r]easonable rights of visitation may be granted [to certain grandparents] when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship")
Ohio	*Harrold* v. *Collier*, 836 N.E.2d 1165, 1172-1173 (Ohio 2005) (Parents are afforded sufficient constitutional protection as long as trial court gives "special weight" to parent's objections and places the burden on the nonparents to prove "that visitation would be in the best interest" of the child)	Ohio Rev. Code Ann. § 3109.11 (LexisNexis 2003) ("If either the father or mother of an unmarried minor child is deceased, [a court] may grant the parents and other relatives of the deceased father or mother reasonable companionship or visitation rights * * * if the court determines that the granting of the companionship or visitation rights is in the best interest of the minor child.")

State	Case Law	Statute
Pennsylvania	*Hiller* v. *Fausey*, 904 A.2d 875 (Pa. 2006)	Pa. Cons. Stat. Ann., tit. 23, § 5311
South Dakota	*Currey* v. *Currey*, 650 N.W.2d 273, 277 (S.D. 2002) (holding that a grandparent visitation statute was valid so long as the burden is on the grandparents to prove that visitation is in the child's best interests "and either the visitation would not significantly interfere with the parent-child relationship or the parent of custodian of the grandchild has denied or prevented a grandparent reasonable opportunity to visit the grandchild") (quoting S.D. Codified Law § 25-4-52)	S.D. Codified Laws § 25-4-52 (Supp. 2003) (providing that a court may grant grandparents reasonable rights of visitation "if the visitation is in the best interests of the grandchild and: (1) If the visitation will not significantly interfere with the parent-child relationship; or (2) If the parent * * * has denied or prevented the grandparent reasonable opportunity to visit the grandchild")
West Virginia	*West Virginia* v. *Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (holding that *Troxel* does not bar awarding grandparents custody so long as court makes "an affirmative finding that such visitation will not cause a substantial interference	W. Va. Code Ann. § 48-10-501 (LexisNexis Supp. 2006) ("The * * * court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship.")

State	Case Law	Statute
	in the parent-child relationship, as well as an affirmative finding that such visitation meets the traditional test of serving the best interests of the child")	

States That Require A Harm Standard Under the Federal Constitution

State	Case Law	Statute
Arkansas	*Linder* v. *Linder*, 72 S.W.3d 841, 858 (Ark. 2002) ("There must be some other special factor such as harm to the child or custodial unfitness that justifies state interference")	Ark. Code Ann. § 9-13-103(c)(1) (Supp. 2005) (requiring grandparents to rebut presumption that parent's decision denying or limiting visitation is in the best interest of the child)
Connecticut	*Roth* v. *Weston*, 789 A.2d 431, 443, 445 (Conn. 2002) (grandparents must "establish a parent-like relationship" with the child and must prove "that the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm.")	Conn. Gen. Stat. Ann. § 46b-59 (West 2004) (allowing court to grant the right of visitation "to any person" according to "the best interest of the child")

State	Case Law	Statute
Georgia (harm standard imposed by statute after prior statute held unconstitutional by pre-*Troxel* case)	*Brooks* v. *Parkerson*, 454 S.E.2d 769, 773 (Ga. 1995) ("[A]ssuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child.")	Ga. Code Ann. § 19-7-3(c) (2004) (A court may grant grandparents reasonable visitation rights if it "finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interests of the child would be served by such visitation.")
Illinois (harm standard imposed by statute after best interests standard held to violate *Troxel*)	*Wickham* v. *Byrne*, 769 N.E.2d 1, 8 (Ill. 2002) (holding statute unconstitutional because it "infringe[d] on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made") (quoting *Troxel*, 530 U.S. at 72-73)	750 Ill. Comp. Stat. Ann. 5/607 (West Supp. 2006) (In determining grandparent visitation, "there is a rebuttable presumption that a fit parent's * * * decisions regarding * * * visitation are not harmful to the child's mental, physical, or emotion health. The burden is on the party filing a petition * * * to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health.")

State	Case Law	Statute
Iowa	*In re Marriage of Howard*, 661 N.W.2d 183, 191 (Iowa 2003) ("If grandparent visitation is to be compelled by the state, there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of the grandparents.")	Iowa Code Ann. § 598.35 (West 2001) (providing that a grandparent or great-grandparent may petition for visitation rights in certain circumstances, and that the petition "shall be granted only upon a finding that the visitation is in the best interests of the child and that the grandparent or great-grandparent had established a substantial relationship with the child prior to the filing of the petition")
Massachusetts	*Blixt* v. *Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2002) (Grandparents must "prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare.")	Mass. Gen. Laws Ann. ch. 119, § 39D (West 2003) (providing that grandparents may be granted reasonable visitation rights in certain circumstances "upon a written finding that such visitation rights would be in the best interest of the * * * child")
Michigan (harm standard imposed by statute; prior statute	*DeRose* v. *DeRose*, 666 N.W.2d 636, 643-644 (Mich. 2003) (holding the previous Michigan grandparent visitation statute unconstitutional, but not reaching the harm question)	Mich. Comp. Laws Ann. § 722.27b(4)(b) & (6) (West Supp. 2006) (Grandparents seeking custody "must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of

State	Case Law	Statute
held to violate *Troxel*'s requirement of deference to fit parents)		harm to the child's mental, physical, or emotional health" and, if they do, the court shall grant reasonable visitation if it "finds by a preponderance of the evidence that it is in the best interests of the child" to do so.)
New Hampshire	*In re R.A.*, 891 A.2d 564, 580 (N.H. 2005) ("to grant custody to a * * * grandparent * * *, it is necessary that there be a substantial psychological parent-child relationship between the child and the * * * grandparent, such that denial of custody to [the grandparent] would 'be substantially harmful to the child.'") (quoting *In re Diana P.*, 424 A.2d 178, 181 (N.H. 1980))	N.H. Rev. Stat. Ann. § 4610A:13(II) (Lexis Nexis Supp. 2006) (requiring court to consider "the best interest of the child" in making grandparent visitation decision)
New Jersey	*Moriarty* v. *Bradt*, 827 A.2d 203, 222 (N.J. 2003) ("[T]he only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of	N.J. Stat. Ann. § 9:2-7.1(a) (West 2002) (providing that a "grandparent or any sibling of a child" can apply for an order of visitation and that it is "the burden of the applicant to prove by a preponderance of the evidence that the

State	Case Law	Statute
	a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child.")	granting of visitation is in the best interests of the child")
Texas (harm standard imposed by statute after *Troxel*)	*In re Mays-Hooper*, 189 S.W.3d 777, 777 (Tex. 2006) (*per curiam*) (denying a grandparent visitation under prior statute on facts "indistinguishable" from *Troxel*)	Tex. Fam. Code Ann. § 153.433 (Vernon Supp. 2006) ("[A] court shall order "reasonable possession of or access to a grandchild by a grandparent if" the grandparent proves "by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being.")
Virginia	*Williams* v. *Williams*, 501 S.E.2d 417, 418 (Va. 1998) ("[B]efore [grandparent] visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation.")	Va. Code Ann. § 20-124.2(B) (Supp. 2004) ("The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.")

State	Case Law	Statute
Washington	*In re Parentage of C.A.M.A.*, 109 P.3d 405, 413 (Wash. 2005) ("[A]pplication of the 'best interests of the child' standard rather than 'harm to the child' standard is unconstitutional * * * .")	Wash. Rev. Code Ann. § 26.09.240(4)-(5) (West 2005) (applying best interests standard and presumption that "[v]isitation with a grandparent [is] in the child's best interests when a significant relationship has been shown to exist[,]" which "may be rebutted by a preponderance of evidence showing that visitation would endanger the child's physical, mental, or emotional health")

States That Require Proof of Circumstances Equivalent to Harm Under the Federal Constitution

State	Case Law	Statute
Maine	*Rideout* v. *Riendeau*, 761 A.2d 291, 300-301 (Me. 2000) (court cannot give grandparent visitation over fit parent's objection without "urgent reasons," including "harm consisting of a threat to physical safety or imminent danger")	Me. Rev. Stat. Ann., tit. 19-A, § 1803(3) (Supp. 2006) ("[C]ourt may grant a grandparent reasonable rights of visitation" if it is "in the best interest of the child and would not significantly interfere with any parent-child relationship or with the parent's rightful authority * * *.")

State	Case Law	Statute
Mississippi	*Stacy* v. *Ross*, 798 So. 2d 1275, 1280, 1282 (Miss. 2001) ("[F]orced, extensive unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents.")	Miss. Code Ann. § 93-16-5 (Supp. 2006) ("[T]he court may, in its discretion, if it finds that such visitation rights would be in the best interest of the child, grant to a grandparent reasonable visitation rights * * *.")
South Carolina	*Camburn* v. *Smith*, 586 S.E.2d 565, 568 (S.C. 2003) (Grandparents must show "compelling circumstances such as significant harm to the child" to receive court-ordered visitation)	S.C. Code Ann. § 20-7-420(A)(33) (Supp. 2005) (A court may award visitation to certain grandparents "upon a written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship.")
Vermont	*Glidden* v. *Conley*, 820 A.2d 197 (Vt. 2003) ("To overcome a parent's decision on grandparent visitation, a grandparent must show circumstances like parental unfitness or [that] significant harm to the child will result in the absence of a visitation order (thus suggesting parental unfitness).")	Vt. Stat. Ann., tit. 15, § 1011(a) (2002) ("A * * * court * * * may award visitation rights to a grandparent * * * if the court finds that to do so would be in the best interest of the child.")

States Whose Highest Court Has Not Definitively Resolved Whetherthe Fourteenth Amendment's Due Process Clause Requires a Showing of Actual or Potential Harm

State	Case Law	Statute
Alabama	*Dodd* v. *Burleson*, 932 So. 2d 912, 920 (Ala. Civ. App. 2005) ("harm standard is not constitutionally required")	Ala. Code § 30-3-4.1(d) (LexisNexis Supp. 2006) (employing best interests standard)
Arizona	*McGovern* v. *McGovern*, 33 P.3d 506, 511-512 (Ariz. Ct. App. 2001) (modified "best interests" standard not requiring showing of harm sufficient under *Troxel*")	Ariz. Rev. Stat. Ann. § 25-409(A) (Supp. 2006) (allowing grandparent visitation under best interests standard if either a parent is deceased or missing, the child was born out of wedlock, or the parents are divorced)
Florida	*Sullivan* v. *Sapp*, 866 So. 2d 28, 38 (Fla. 2004) ("[S]tatutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child standard, without the required showing of harm to the child, to [violate the State constitution's privacy right.")	Fla. Stat. Ann. § 752.01(1) (West 2005) ("The court shall * * * award reasonable rights of visitation to the grandparent * * * when it is in the best interest of the minor child if" the parents are divorced, a parent has deserted, or the child was born out of wedlock)

State	Case Law	Statute
Hawaii		Haw. Rev. Stat. Ann. § 571-46.3(2) (LexisNexis 2005) ("The court may award [a grandparent] reasonable visitation rights provided that * * * [r]easonable visitation rights are in the best interest of the child.")
Idaho	*Leavitt* v. *Leavitt*, 132 P.3d 421, 428 (Idaho 2006) (declining to address the constitutionality of the state grandparent visitation statute in light of *Troxel*)	Idaho Code Ann. § 32-719 (2006)("The district court may grant reasonable visitation rights to grandparents or great-grandparents upon a proper showing that the visitation would be in the best interests of the child.")
Indiana	*Crafton* v. *Gibson*, 752 N.E.2d 78 (Ind. App. 2001) (holding that *Troxel*'s requirement that "special weight" be accorded fit parents' decision was met when "a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child's best interest")	Ind. Code Ann. § 31-17-5-1, -2 (LexisNexis 2003) (allowing court to award grandparent visitation if the parent is deceased, the parents were divorced in Indiana, or the child was born out of wedlock and "if the court determines that visitation rights are in the best interests of the child")

State	Case Law	Statute
Kentucky	*Vibbert* v. *Vibbert*, 144 S.W.3d 292, 294-295 (Ky. Ct. App. 2004) (*en banc*) (rejecting harm standard as "too narrow" and requiring only that "grandparent seeking visitation * * * prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child")	Ky. Rev. Stat. Ann. § 405.021(3) (LexisNexis 1999) (A court may grant "noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child")
Louisiana	*Galjour* v. *Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001) (upholding best interests standard under *Troxel* in light of other statutory provisions limiting visitation to parents of deceased or absent parent and limiting periods of visitation to what is "reasonable")	La. Rev. Stat. Ann. § 9:344 (2000) (providing that, when one parent dies or is incarcerated, grandparents "may have reasonable visitation rights * * * if the court in its discretion finds that such visitation would be in the best interest of the child")
Maryland	*Koshko* v. *Haining*, 168 Md. App. 556, 576 (Md. Ct. Spec. App.) (rejecting harm standard) cert. granted, 900 A.2d 751 (Md. 2006)	Md. Code Ann., Fam. Law § 9-102 (2006) (an equity court may grant visitation rights to a petitioning grandparent if it finds visitation "to be in the best interests of the child")

State	Case Law	Statute
Minnesota		Minn. Stat. Ann. § 257C.08(1)-(3) (West 2003) (providing that a court may grant a grandparent's petition for visitation in certain circumstances if visitation rights "would be in the best interests of the child and would not interfere with the parent child relationship")
Montana	*Polasek* v. *Omura*, 136 P.3d 519, 523 (Mont. 2006) (suggesting, in dicta, that a court must inquire into a parent's fitness as a parent and give a fit parent's wishes deference, but that a grandparent may overcome the presumption in favor of the fit parent's wishes by proving "by clear and convincing evidence that it is in the child's best interest to have contact with the grandparent")	Mont. Code Ann. § 40-9-102(2) (2005) ("Grandparent-grandchild contact * * * may be granted only upon a finding by the court * * * that the contact would be in the best interest of the child.")

State	Case Law	Statute
Nevada		Nev. Rev. Stat. Ann. § 125C.050(4) (LexisNexis 2004) ("If a parent * * * has denied or unreasonably restricted [a grandparent's] visits with the child, there is a rebuttable presumption that the granting of a right to visitation * * * is not in the best interests of the child. To rebut this presumption, the [grandparent] must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation.")
New Mexico	*Ridenour* v. *Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995) (holding that "trial court [can] permit grandparent child visitation * * * if allowance of such visitation is shown to be in the best interest of the child")	N.M. Stat. Ann. § 40-9-2 (West 2003) (providing that a court may grant a grandparent visitation privileges after considering "any factors relevant to the best interests of the child," among other things)
New York	*E.S.* v. *P.D.*, 815 N.Y.S.2d 607, 609 (N.Y App. Div.) (2006) (holding that requiring "that the grandparent establish why visitation is in the child's best interest * * * necessarily gives the parent's	N.Y. Dom. Rel. Law § 72(1) (McKinney Supp. 2006) ("Where either or both of the parents of a minor child * * * is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent

State	Case Law	Statute
	decision presumptive weight," thus satisfying *Troxel*)	or the grandparents of such child may apply to the supreme court * * * [and the court] may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.")
North Carolina	*Adams* v. *Tessener*, 550 S.E.2d 499, 505 (N.C. 2001) (showing some willingness to set aside parent's decision, but relying mostly on parent's fitness)	N.C. Gen. Stat. Ann. § 50-13.2(b1) (West Supp. 2006) (A court "may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate.")
North Dakota		N.D. Cent. Code § 14-09-05.1 (2004) ("The grandparents and great-grandparents of an unmarried minor may be granted reasonable visitation rights to the minor by the district court upon a finding that visitation would be in the best interests of the minor and would not interfere with the parent-child relationship.")
Oklahoma	*Neal* v. *Lee*, 14 P.3d 547, 550 (Okla. 2000) (holding that, although "[a]fter *Troxel*, it is unclear whether a showing of harm is	Okla. Stat. Ann., tit. 10, § 5(A)(1)(a)-(b) (West Supp. 2006) ("[A]ny grandparent or grandparents of an unmarried minor child may

State	Case Law	Statute
	necessary under the United States Constitution," harm is required under the Oklahoma Constitution)	seek and be granted reasonable visitation rights * * * if * * * the district court deems it to be in the best interest o fthe child * * * and there is a showing of parental unfitness or unsuitability or that the child would suffer harm or potential harm without the granting of visitation rights * * *.")
Oregon	*In re Marriage of O'Donnell-Lamont*, 91 P.3d 721 (Or. 2004) (considering, among other factors, whether harm would result to the child if he remained in the parent's custody)	Ore. Rev. Stat. § 109.119(1)-(3) (West Supp. 2006) (providing that "any person * * * who has established emotional ties creating a child-parent relationship or an ongoing relationship with a child may petition" for custody, guardianship, or right of visitation, and that a court will grant the petition "if to do so is in the best interest of the child," and petitioner has rebutted the "presumption that the legal parent acts in the best interest of the child")
Rhode Island	*Rubano* v. *DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (holding that "if the Family Court were able to find that [non-	R.I. Gen. Laws § 15-5-24.3(a)(2)(i) & (a)(2)(v) (2003) (providing that a court may grant visitation rights to a grandparent or sibling, if it

State	Case Law	Statute
	grandparent third-party's] alleged de facto parental relationship with the child, her asserted visitation agreement with [the parent], and the claimed need to prevent any harm to the child's best interests not only existed in this case but constituted clear and convincing evidence sufficient to overcome the otherwise applicable presumption [from *Troxel*] in favor of honoring a fit custodial parent's determination not to allow such visitation * * *, then it could award visitation to [the non-grandparent third-party])	finds that "it is in the best interest" of the child and that "the petitioner, by clear and convincing evidence, has successfully rebutted the presumption that the parent's decision" to refuse visitation was reasonable)
Tennessee	*Hawk* v. *Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) (holding on state constitutional grounds that grandparents cannot obtain visitation over fit parent's objection "when no substantial harm threatens [the] child's welfare")	Tenn. Code Ann. § 36-6-306(b)(1) & (c) (2005) (providing that a court may grant grandparent visitation if it first finds "the presence of a danger of substanstial harm to the child" and then finds that "grandparent visitation would be in the best interests of the child")

State	Case Law	Statute
Utah	*In re Estate of Thurgood*, 144 P.3d 1083, 1093 (Utah 2006) (A "court may grant grandparents visitation if the grandparents can clearly and convincingly show they share a 'substantial relationship' with the grandchild and the 'loss or cessation of that relationship is likely to cause harm to the grandchild,'" or that "the child's parent has 'denied or unreasonably limited' visitation.")	Utah Code Ann. § 30-5-2(2) (Supp. 2006) (providing that a court may grant visitation to petitioning grandparents "if the court finds that the petitioner has rebutted the presumption" "that a parent's decision with regard to grandparent visitation is in the grandchild's best interests," based on several factors, including whether the loss of the relationship likely causing harm to the child and whether visitation is in the best interest of the grandchild)
Wisconsin	*In re Paternity of Roger D.H.*, 641 N.W.2d 440, 443 (Wis. Ct. App. 2002) (holding that according "a presumption that a fit parent's decision regarding [grandparent] visitation is in the best interest of the child" satisfies *Troxel*'s requirement that "special weight" be given fit parents' decisionmaking)	Wis. Stat. Ann. § 767.43(1) (West Supp. 2006) ("[A] grandparent * * * who has maintained a relationship similar to a parent-child relationship with the child [may be granted] reasonable visitation * * * if the court determines that visitation is in the best interest of the child.")

State	Case Law	Statute
Wyoming		Wyo. Stat. Ann. § 20-7-101(a) (2005) ("If the court finds, after a hearing, that visitation would be in the best interest of the child and that the rights of the child's parents are not substantially impaired, the court shall grant reasonable visitation rights to the grandparent.")

FILED
FEB 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-863

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether parental rights were sufficiently protected when the Supreme Court of Pennsylvania approved limited visitation to a grandmother who overcame the judicially-imposed strong presumption in favor of the visitation decision of a fit parent and also met the requirements of the state grandparent visitation statute by demonstrating that (1) she had almost daily contact with her young grandson until her daughter's death, when the child's father abruptly terminated that contact, and that (2) the limited visitation that was granted would not interfere with the parent-child relationship and would be in the best interest of the child.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Petitioner requests this Court to review a decision of the Supreme Court of Pennsylvania upholding the constitutionality of a grandparent visitation order under Section 5311 of that state's Domestic Relations Code. As applied by the court, this statute permits "reasonable" visitation by a parent of a deceased parent upon a judicial "finding" supported by convincing reasons that the visitation "would not interfere with the [surviving] parent-child relationship" and "would be in the best interest of the child," taking into consideration the previous "amount of personal contact" between the grandparent and the child. 23 Pa. Cons. Stat. Ann. § 5311.

Petitioner's framing of the question presented as whether a clear and convincing showing of "harm" to the child is necessary to order grandparent visitation over a parent's objection mischaracterizes both this case and this Court's holding in *Troxel v. Granville*, 530 U.S. 57 (2000). The Pennsylvania statute mirrors two other state statutes cited with approval in *Troxel*, and the Pennsylvania Supreme Court applied a strong presumption in favor of a fit parent's child rearing decisions and held the grandparent to a higher standard of proof than *Troxel* required. Petitioner was essentially afforded the protection he seeks, and there is no reason for further review of this case.

1. The Relationship Between Kaelen Fausey and His Grandmother, Cheryl Hiller

When Kaelen Fausey was less than four years old, his mother, Stephanie Fausey, was diagnosed with a life-threatening form of cancer. R. 15, R. 174-75.[1] As she endured the intensive and protracted medical treatment required, she and her husband relied heavily upon the aid of her mother, Cheryl Hiller. 67a.

Kaelen grew exceptionally close to his grandmother as a result of her devotion to him during his mother's illness. 67a, 70a. He often visited Hiller's home, where he was able to develop relationships with many of his cousins, as well as his great-grandfather and other family members. 70a. Hiller also frequently spent time with Kaelen one-on-one, taking him on picnics, swimming trips, and stock car events. 70a.

When Stephanie Fausey's condition worsened, Hiller's contact with Kaelen intensified, as she and other family members made themselves available to help in whatever ways they could. 67a. Beginning in 2000, Hiller babysat for Kaelen regularly, and, along with Kaelen's great-grandfather, provided him with transportation to and from school. *Id.* When it became clear that his mother's situation was hopeless, it was Hiller who helped to prepare her grandson for the eventuality of his loss. 2a, 71a.

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[1] Citations preceded by "R" refer to the record below; citations followed by "a" refer to the appendix to the petition.

Stephanie Fausey died on May 25, 2002. Kaelen was seven years old. 65a.

Not long after his mother's death, Kaelen's almost-daily contact with his grandmother was abruptly terminated by his father, Shane Fausey. 2a, 67a. Between May 2002 and April 2003, Hiller was able to see Kaelen on only three occasions, one of which occurred accidentally and none of which occurred at her home. 67a. Hiller repeatedly pleaded with Fausey to permit her to continue having a relationship with her grandson. 67a-68a. However, her phone messages went unreturned, and if Fausey answered the phone, he represented that Kaelen could not visit Hiller because of other plans. 68a.

2. The Pennsylvania Court Proceedings

As a result of Fausey's continual refusals to allow Hiller to spend time with Kaelen, Hiller filed an application for visitation with the Court of Common Pleas of Lycoming County, Pennsylvania. 2a. Fausey opposed Hiller's application, at times contending that it would be in Kaelen's best interest to be completely barred from contact with his grandmother and at other times vacillating on the amount of visitation he believed should be permitted. 4a, 68a.

The court held a two-day trial and heard testimony from 14 fact witnesses and one expert witness. 66a. After considering this extensive evidentiary record, the court entered a final order in which it awarded Hiller one overnight visit with Kaelen per month from 9:00

a.m. on Saturday to 7:00 p.m. on Sunday, plus one week of vacation during the summer, with Hiller required to provide all transportation. 85a-86a. The court denied Hiller's request for visitation for any length of time on Christmas Eve or Christmas Day. R. 234.

As the Pennsylvania Supreme Court noted, the trial court's application of Section 5311 was thoroughly supported by the record and the law. 3a. First, the trial court applied a "presumption that a fit parent acts in the child's best interests" and placed the burden of proof squarely on the grandparent. 3a, 66a. The court then considered the contact between Hiller and Kaelen prior to Hiller's application. 3a, 67a, 70a. It also considered whether visitation would interfere with Fausey's relationship with Kaelen. 6a, 71a-73a. The court made numerous specific factual findings to support its ultimate decision, including the following:

- Kaelen had extensive and longstanding contact with Hiller before his mother's death, which was permitted by both parents. 67a, 70a.
- Kaelen clearly enjoyed the time he spent at Hiller's home, to the point that he often did not want to leave. 70a.
- Kaelen would benefit from the continued opportunity to spend time with his maternal great-grandfather, who has always been an important person in his life. 71a.
- Historically, Kaelen had sought out Hiller to express his emotions and receive comfort

regarding his mother's death—emotional support that Fausey himself acknowledged Kaelen needed as he was unable to express his feelings in other circumstances. 71a.

- There was no evidence showing any possibility that Hiller might interfere in any way with Kaelen's loving relationship with his father. 71a-73a.

The trial court found that Hiller rebutted the presumptive validity of Fausey's decision regarding visitation and demonstrated that visitation with her would be in Kaelen's best interest and would not disturb his relationship with his father. 73a. On appeal, both the Pennsylvania Superior Court and Supreme Court upheld this decision. 25a-26a, 64a.

The Pennsylvania Supreme Court's decision included a comparison of the statute and factual findings in this case to those in *Troxel*. The court noted that this Court's rationale in *Troxel* was three-pronged: (1) the Washington statute was "breathtakingly broad," allowing ***any person at any time*** to petition for child custody, 530 U.S. at 67; (2) the Washington trial court, rather than granting presumptive validity to the fit parent's decision, instead applied a ***presumption in favor of the grandparent***, *id.* at 59; and (3) the Washington trial court failed to base its decision on anything more than ***"slender findings,"*** *id.* at 71. *See* 10a.

In contrast, the Pennsylvania Supreme Court rested its decision on the following: (1) Section 5311 of the Domestic Relations Code contains ***explicit limitations*** on who may petition for visitation; (2) in accordance with precedent, the Pennsylvania trial court applied the ***presumption that the parent's decision regarding grandparent visitation was in the child's best interest*** and required Hiller to overcome that presumption; and (3) the Pennsylvania trial court issued ***extensive factual findings*** in support of its conclusion that Hiller should be granted limited visitation rights and that such visitation would not harm Kaelen or his relationship with Fausey in any way. 25a-26a.

Applying strict scrutiny and a "convincing reasons" standard because of the constitutional rights involved, the Pennsylvania Supreme Court concluded that the trial court had satisfied both the statute and the constraints of *Troxel*. 17a, 21a, 25a. The court further held that in combination the "stringent requirements [of the statute] and the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm." 25a.

REASONS FOR DENYING THE WRIT

This Court disapproved the decision of the Washington trial court in *Troxel* because of its failure to pay any heed to the constitutional right of parents to guide the upbringing of their children. At the same time, however, this Court wisely declined to immerse itself in detailed line-drawing as to what circumstances must be present before visitation may be awarded against a fit parent's wishes. Such family law issues, perhaps more than any others, traditionally have been left to the states to decide. This case offers no reason for the Court to deviate from that course.

Petitioner now asks this Court to engage in the exact exercise that it declined to perform in *Troxel*. Despite petitioner's contrary assertions, there is no significant conflict among the states suggesting any need for the Court to accept this invitation. The Pennsylvania court decisions in this case carefully applied each of the principles set forth by this Court in *Troxel*--affording the parent even more protection than was required there--and are generally consistent with those of other state courts. To the extent that other jurisdictions may occasionally go outside the norm, further review of this case would be unlikely to remedy the situation because the Pennsylvania statutory scheme as applied falls well within the *Troxel*-approved paradigm. Accordingly, the petition should be denied.

I. The States Are Not Deeply Divided in Their Post-*Troxel* Decisions Regarding Grandparent Visitation.

Petitioner's primary argument is that this Court left open a constitutional question in *Troxel* that it should now resolve because the states are "deeply divided" on the issue. Pet. at 2, 11. However, there is no such deep division requiring the Court's intervention.

As noted above, the Washington child custody statute at issue in *Troxel* was problematic because it allowed "any person" to petition a court "at any time" for visitation rights. The Washington Supreme Court held that the statute was unacceptable because (1) it was worded far too broadly, and (2) the United States Constitution prohibits a state from overriding a parent's wishes regarding child custody or visitation unless it is necessary "to prevent harm or potential harm to a child." 530 U.S. at 63.

This Court agreed with the first of these rationales, but expressly declined to rule on the second. *Id.* at 73. It chose not to reach that question because it recognized the need for factual sensitivity in custody and visitation issues. As the plurality opinion stated: "Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* Accordingly, the Court deliberately decided not to promulgate a bright-line or *per se* standard to be applied in all grandparent visitation cases.

Troxel produced no "deep division" among the states, and there is no need to revisit this area of the law or elaborate upon that decision. Petitioner attempts to manufacture the appearance of a division by grouping states into two categories allegedly based on whether they require grandparents seeking visitation to prove that such visitation "is necessary to avoid harm to the child." Pet. at 12. In the process, petitioner (1) ignores the protections given parents by Pennsylvania and other states that permit grandparent visitation without an explicit showing of harm to the child and (2) overstates the test employed in states that appear to require grandparents seeking visitation to show that denial of the request would result in harm to the child.

Petitioner contends that in the states he characterizes as falling on the "no harm" side of the "divide," parental rights are subject to no protection at all and judges "may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's 'best interests.'" Pet. at 4. This simply is not so.

All states on both sides of the alleged "divide," including petitioner's 11 so-called "no harm" states, give protection and weight to parents' rights through a kaleidoscope of different methods. In the case of the "no harm" states, these methods include the following:

- Some states permit awards of visitation only in the event of exceptional circumstances such as the death of one parent or the divorce or separation of the parents.

See, e.g., 23 Pa. Cons. Stat. Ann. §§ 5311, 5312; Minn. Stat. § 257C.08; Mo. Rev. Stat. § 452.402; Ohio Rev. Code Ann. § 3109.11.

- Some states require a preexisting relationship of some significance between the grandparent and the child, which may need to be coupled with a limiting circumstance such as the death of one parent or the divorce or separation of the parents, as a condition precedent to the award of visitation. *See, e.g.*, 23 Pa. Cons. Stat. Ann. § 5311; Kan. Stat. Ann. § 38-129(a); Minn. Stat. § 257C.08; Neb. Rev. Stat. § 43-1802(2).

- Some states require grandparents to demonstrate not only that allowing visitation would be in the child's best interest, but also that such visitation would have no adverse effect upon the child's relationship with the surviving parent. 23 Pa. Cons. Stat. Ann. § 5311; Minn. Stat. § 257C.08; Neb. Rev. Stat. § 43-1802(2); S.D. Codified Laws § 25-4-52; W. Va. Code Ann. § 48-10-501.

- Finally, some states require the grandparent to rebut the presumption required by this Court favoring the fit parent's decision on visitation by a heightened evidentiary showing, such as clear or convincing evidence. *See, e.g.*, 21a; *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); *Polasek v. Omura*, 136 P.3d 519 (Mont. 2006); *Hamit v. Hamit*, 715 N.W.2d 512 (Neb. 2006).

A majority of the so-called "no harm" states use some combination of these limitations to accord "special weight" to a fit parent's visitation decision as

this Court required in *Troxel*. 530 U.S. at 69. ***Parents are given all of these protections in Pennsylvania***. 25a.

Petitioner attempts to contrast the foregoing states with 12 others whose high courts supposedly require a showing of "harm" before grandparent visitation may be ordered, and claims "that any lesser standard . . . would afford inadequate 'special weight' to the fit parent's determination of what is best for the child." Pet. at 13.[2] However, the petition obscures significant similarities between the law of these states and that of the so-called "no harm" states.

As this Court acknowledged in *Troxel*, decisions in this area by their nature are intensely fact-specific. 530 U.S. at 73. On close analysis, the so-called "harm" states employ a much more nuanced and thoughtful approach than simply requiring the same harm in all cases to protect parental rights. The "harms" identified in the highest court decisions of these states bear many similarities to the limitations imposed in the so-called "no harm" states, demonstrating that petitioner's "harm-no harm" distinction is essentially semantic.[3]

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[2] Among the cases that petitioner cites as requiring "harm," two predate this Court's 2000 decision in *Troxel* and therefore do not constitute evidence of any post-*Troxel* "divide." *See Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998).

[3] In fact, a number of the so-called "harm" states do not require harm per se before ordering grandparent visitation. Rather, they require a showing of "harm ***or potential harm***"—a crucial

For example, while the New Jersey Supreme Court in *Moriarty v. Bradt*, 827 A.2d 203, 223-24 (N.J. 2003), required a showing of "harm" under the specific circumstances of that case, it also explicitly stated that grandparents "may rely on the death of a parent or the breakup of the child's home through divorce or separation" to show harm and referred to other visitation statutes that "specifically recognize the potential for harm when a parent has died or a family breakup has occurred and visitation is denied."

Similarly, in *Blixt v. Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2002), the Massachusetts Supreme Judicial Court made clear that the requirement it imposed on grandparents to show that the absence of visitation would cause the child significant harm presupposed a significant preexisting relationship between the grandparent and the child. The court further noted that disturbing a "child's preexisting relationship with a nonbiological parent" may be harmful in and of itself. *Id.* at 1061.

Further, in *In re C.A.M.A.*, 109 P.3d 405 (Wash. 2005), the Washington Supreme Court (the court whose reasoning this Court declined to adopt in *Troxel*) recognized that the arbitrary deprivation of a substantial relationship between a child and a third

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distinction ignored throughout the petition. Indeed, as this Court noted, even the Washington Supreme Court's holding in *Troxel*, which petitioner chides the Court for declining to follow, required only "harm or potential harm." 530 U.S. at 63.

person could cause severe psychological harm to the child. *Id.* at 410.

When these decisions of the so-called "harm" states are considered alongside the decisions and statutes of the so-called "no harm" states, petitioner's claim of a "deep divide" rings hollow. The law is much more complex and fact-specific than he acknowledges.

Moreover, a number of the so-called "harm" states permit grandparents to satisfy their burdens of proof by a preponderance of the evidence.[4] By contrast, many of the "no harm" states require clear or convincing evidence. *See supra* p. 10. It is far from clear

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[4] *See, e.g., Blixt*, 774 N.E.2d at 1060 (grandparents in Massachusetts must establish "by a preponderance of the credible evidence, that a decision by the judge to deny visitation is not in the best interests of the child"); *Moriarty*, 827 A.2d at 223 ("We instead approve a preponderance of the evidence burden in the [New Jersey] statute as fully protecting the fundamental rights of parents when coupled with the harm standard."); Ark. Code Ann. § 9-13-103(c)(2) ("petitioner must prove by a preponderance of the evidence . . . a significant and viable relationship with the child . . . and [v]isitation with the petitioner is in the best interest of the child"); Mich. Comp. Laws § 722.27b(4)(b) ("grandparent . . . must prove by a preponderance of the evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health"); Tex. Fam. Code Ann. § 153.433(2) ("grandparent . . . overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being").

which set of rules grants greater protection to parental rights—the one requiring a showing of "harm" under a mere preponderance standard, or the one requiring a showing of other similar (though alternately labeled) circumstances under a clear or convincing standard. Indeed, the Pennsylvania Supreme Court concluded that an independent "specific requirement of harm or potential harm" was not necessary precisely because of the other protections that its statute and precedents afford parents. 25a.

As this Court made clear in *Troxel*, the adoption of a bright-line rule requiring a showing of harm for all grandparent visitation orders would undermine the states' ability to evaluate cases on their individual facts. Petitioner's alleged "divide" is an arbitrary line drawn to distract attention from the facts of this case and give him another opportunity to achieve the result he desires. It does not reflect a conflict that merits this Court's attention.

II. A Grant of the Petition Would Deeply Enmesh This Court in Case-By-Case Line-Drawing in an Area of Law Traditionally Left to the States.

It has long been the position of this Court that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987). Since the early days of American history, the Court has striven to avoid entanglement in domestic relations cases of all stripes. *See, e.g., Barber v. Barber*, 62 U.S. 582, 584 (1859) (divorce

and alimony); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (same); *cf. Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992) (child custody); *Marshall v. Marshall*, 547 U.S. ___ (2006), 126 S. Ct. 1735 (probate).

The deference to state courts in the domestic relations realm, of course, is not absolute. This Court agreed to hear a child visitation question in *Troxel* because a fundamental parental right was threatened. But here petitioner is not asking this Court to prevent encroachment on an existing constitutional right. Rather, in essence he seeks to have the Court constitutionalize the field of grandparent (perhaps even all third-party) visitation law. *See* Pet. at 19.

In *Troxel*, this Court was faced with a state's failure to adhere to basic due process principles. The Washington state trial court applied a "breathtakingly broad" statute, 530 U.S. at 67, issued only "slender findings," *id.* at 72, and failed to give any deference to parental decisions regarding children's best interests, *id.* at 69. These manifest deficiencies moved this Court to act – but with great circumspection.

The plurality in *Troxel* specifically declined to address either the facial validity of the Washington statute or the broad constitutional rationale advanced by the Washington Supreme Court for overturning it. Instead, the decision was based "on the sweeping breadth of [the statute] and the application of that broad, unlimited power in [that] case." *Id.* at 73. The decision thus articulated this Court's disapproval of a dramatic failure to respect basic parental rights, while

also allowing the Court to avoid deeper involvement in an area of law that is complex, fact-intensive, and traditionally left to the states. Petitioner now wishes to enmesh the Court in exactly the case-by-case adjudication and line-drawing that *Troxel* eschewed.

Petitioner suggests that he is merely requesting the application of a bright-line grandparent visitation rule that has already been clearly delineated by 12 states. Pet. at 21, 23. This is not so. As discussed above, the law of those states is subject to a multiplicity of nuances and fact-specific variations. *See supra* pp. 11-14.

The rule petitioner proposes is, by its own terms, ambiguous and does not provide a clear-cut principle that will allow this Court to avoid extensive further line-drawing in the future. Most notably, petitioner has failed to offer any definition of "harm." Is it limited to actual harm, or does it include potential harm? Is it limited to physical harm, or does it include emotional or psychological harm? Is it measured in comparison to the child's state before the death of his parent, or to the pre-litigation status quo? Petitioner does not answer these questions, and the decisions of the 12 courts he cites do not provide any consensus.

Thus, grant of the petition would provide no final answer to constitutional questions in this area. To the contrary, it would simply create a panoply of new visitation questions for the Court to resolve. The federalization of this area of family law would then be complete.

If the definition of "harm" were to become the new boundary line of constitutionality, then nearly every grandparent visitation application in the country would implicate constitutional principles. *Troxel* represented a reasonable response to the inherent difficulties of applying the Due Process Clause to family law. Petitioner's proposed dramatic expansion of that response is unnecessary and would needlessly complicate this area of law—one traditionally relegated to the states.

III. The Pennsylvania Supreme Court's Decision Does Not Provide Any Reason for This Court To Reconsider the Issue of Grandparent Visitation.

The decisions made by the Pennsylvania courts in the instant case fully comport with the principles set forth in *Troxel*. Petitioner was afforded a presumption that his parental decision regarding grandparent visitation was in the child's best interest, and that presumption was overcome by respondent in a constitutionally permissible manner. The Pennsylvania Supreme Court's reading of Section 5311—coupled with the heightened evidentiary burden already placed on grandparents by virtue of Pennsylvania precedent—sufficiently protect a fit parent's right to direct the upbringing of his or her children under the Due Process Clause. As such, this case presents no need for review.

The *Troxel* plurality cited with approval several state statutes that, properly applied, would accord to a fit parent's visitation decision the type of "special weight" contemplated by this Court. 530 U.S. at 69-70.

As the Pennsylvania Supreme Court noted, the Minnesota and Nebraska statutes included in this list are both substantially similar to Pennsylvania's Section 5311. 15a-16a n.16 (citing Minn. Stat. § 257.022(2)(a)(2) (now codified at Minn. Stat. § 257C.08); Neb. Rev. Stat. § 43-1802(2)).

In applying Section 5311, the Pennsylvania Supreme Court specifically recognized the "fundamental nature of the right" at issue and applied strict scrutiny analysis to determine whether infringement of that right was "supported by a compelling state interest," specifically, "the state's longstanding interest in protecting the health and emotional welfare of children." 17a-18a. The court recognized that Section 5311 narrowly limits the class of grandparents who may seek visitation (to those whose children have died) and that Pennsylvania precedent requires a strong presumption in favor of fit parents' decisions when those decisions are subject to judicial review. 19a-20a.

This presumption squarely provided the parental decision the "special weight" this Court envisioned in *Troxel*. Moreover, the burden placed on the grandparent to rebut that decision was significant. The showing required of the grandparent was not just that the visitation would be in the child's best interest, but also that it was an extension of an already deep relationship and that it would not interfere with the relationship between the parent and the child. 20a.

Summarizing its analysis, the Pennsylvania Supreme Court held that as applied the statute struck a proper balance and was "narrowly tailored to protect the fundamental rights of fit parents while providing for appropriate state intervention to protect the welfare of children through court-ordered grandparent visitation or partial custody." 20a. The court then stated that "the stringent requirements of Section 5311, as applied in this case, combined with the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm." 25a.

In effect, the court held that an independent finding of harm was unnecessary because it is already contemplated by the statutory requirements that visitation may only be awarded where it would not interfere with the parent-child relationship and that courts must consider the amount and nature of the pre-application contact between the grandparent and the child. In short, Pennsylvania is not a "no harm" state (assuming that there are any such states).

Understandably disappointed with the outcome of this visitation case, petitioner has attempted to create a semantic conflict among the states that does not exist in substance. In light of the above, however, we submit that to the extent the Court perceives any desire for further federal guidance in this area, this is not an appropriate case in which to provide such guidance.

CONCLUSION

As the Pennsylvania courts correctly applied the due process principles articulated by this Court in *Troxel* to the facts of this case, and the states are not deeply divided as to these principles, we respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Dated: February 21, 2007.

Supreme Court, U.S.
FILED
MAR 6 - 2007
OFFICE OF THE CLERK

No. 06-863

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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In *Troxel* v. *Granville*, 530 U.S. 57 (2000), this Court recognized that statutes permitting court-ordered grandparent visitation may violate a parent's fundamental constitutional right to make decisions concerning the care, custody, and control of his or her children, *id.* at 68. This case concerns a deep divide among the state courts of last resort as to the legal standard grandparents must meet before a court may order grandparent custody or visitation over a fit parent's objection. At least thirteen States require (as a matter of *federal* constitutional law) a showing that the child will suffer harm without grandparent visitation; twelve state high courts have held that the Constitution requires merely that grandparents demonstrate that such visitation or custody would be in the "best interests of the child." Respondent's attempts to deny that conflict and to dissuade this Court from bringing clarity to this significant constitutional question are unavailing.

Respondent does not dispute (nor can she) that, in *Troxel*, seven Justices recognized that court-ordered grandparent visitation over a fit parent's objection implicates the parent's fundamental constitutional rights. See Pet. 2. Indeed, respondent concedes that "in *Troxel* * * * a fundamental parental right was threatened." Opp. 15. Respondent also does not dispute that *Troxel* expressly reserved the precise question this case squarely presents. See Pet. 3; 530 U.S. at 73.

Instead, respondent denies that a conflict exists on this issue, claiming that petitioner has "manufacture[d]" merely "the appearance of a division." Opp. 9. Making that remarkable assertion requires respondent to ignore the very decision she hopes to preserve: The court below *itself* detailed the clear split of authority among the States (Pet. App. 22a-24a & nn.21-22), as have many other courts (see *infra* pp. 3-5). Respondent seeks to deflect this Court's attention from that well-documented division by suggesting that "a kaleidoscope of different methods" (Opp. 9) sufficiently protects fit parents' fundamental constitutional

right to make child-rearing decisions. But calling a split of authority "semantic" (Opp. 11, 19) does not make it so. Respondent offers no counter to the fact that, as detailed in the petition, ten state courts of last resort and three state legislatures assert that *Troxel* and the Fourteenth Amendment *require* a showing of actual or potential harm, while twelve other state courts of last resort hold that it does not, allowing judges to order grandparent custody or visitation over a fit parent's objection upon finding merely that doing so would be in the child's best interests. Pet. 12-19, 87a-98a; see also *Koshko* v. *Haining*, 2007 WL 93237 (Md. Jan. 12, 2007); *In re E.S.* v. *P.D.*, 2007 WL 470389 (N.Y. Feb. 15, 2007). Moreover, the persistence of this division is readily apparent: In just the two months since this petition for a writ of certiorari was filed, two more state courts of last resort have reached opposite conclusions on exactly this question. See *Koshko*, 2007 WL 93237; *In re E.S.*, 2007 WL 470389; *infra* pp. 3-5.

Respondent's assertions that petitioner somehow seeks the creation of a new constitutional right or hopes to "constitutionalize the field of grandparent * * * visitation law" (Opp. 15) are baseless. To the contrary, this case asks the Court simply to settle disagreement about the content of the fundamental constitutional right recognized in *Troxel*. Deciding where the federal Constitution ends and States' prerogatives begin is a quintessential function of this Court, and that guidance is desperately needed here.

I. Respondent's Attempts To Deny And Obscure The Deep And Widely Recognized Division Among The States Are Futile

A. The Pennsylvania Supreme Court And Other State High Courts Have Explicitly Recognized The Conflict And Two Recent Decisions Have Deepened It

Petitioner's claim that the conflict among the States is merely "semantic" (Opp. 11, 19) is wrong. Most obviously, it flatly contradicts the Pennsylvania Supreme Court below, which explicitly recognized the "harm"–"no harm" divide. Pet. 22a-24a & nn.21-22 (citing thirteen States that "have required a finding of harm prior to a grant of visitation or partial custody" and eight that have not). Moreover, respondent herself apparently acknowledged the existence of this conflict below. Resp. Pa. Br. 38 (arguing that, although "other jurisdictions read their statutes to require a showing of harm to the child, * * * [s]uch a showing of harm * * * need not be grafted onto [the Pennsylvania Grandparent Visitation Statute] to ensure its constitutional application").

Numerous other courts also have recognized this conflict, attributing it to divergent interpretations regarding the scope of the fundamental right recognized in *Troxel*. The Supreme Court of New Jersey, for example, after describing the distinct "harm" and "best interests" standards applied by different state high courts, *Moriarty* v. *Bradt*, 827 A.2d 203, 218-219 (2003), ultimately held the "best interests" standard insufficient to protect parental rights, *id.* at 222. Rather, it held that "the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child." *Ibid.*; see also *In re Marriage of Howard*, 661 N.W.2d 183, 190 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052, 1061 & n.16 (Mass. 2002);

Pet. App., 87a-108a (identifying those States that do and do not require a showing of harm under the federal Constitution). In short, the split of authority is recognized by virtually everyone but respondent.

Indeed, in the two months since this petition was filed, two more state courts of last resort have ruled on the precise question presented in this case, reaching opposite conclusions. In *Koshko* v. *Haining*, the Court of Appeals of Maryland relied in large part on *Troxel*, see 2007 WL 93237, at *7-*10 (Jan. 12, 2007), to hold that an evidentiary presumption in favor of a fit parent's decision was "not sufficient * * * to preserve the constitutionality of the [Maryland Grandparent Visitation Statute]," *id.* at *17. "[A] 'non-constitutional' best interests of the child inquiry * * * which is the proper crucible for resolving disputes *between fit parents*, is inadequate, by itself," that court held, "to protect the vital liberty interests implicated in disputes between *fit parents and third parties* over the upbringing of children." *Id.* at *18 (emphasis added). Preservation of those "fundamental parental liberty interests," the court explained, "requir[es] a threshold showing of * * * exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children." *Ibid.*

The Court of Appeals of New York recently interpreted *Troxel* to reach precisely the opposite conclusion. *In re E.S.* v. *P.D.*, 2007 WL 470389 (Feb 12, 2007). Relying in part upon the decision below in this case, *id.* at *15, the court held that New York's Grandparent Visitation Statute was constitutional as applied where "visitation between grandmother and the child is in the child's best interest," *id.* at *9. That court rejected a harm standard, holding instead that, under *Troxel*, the best interests standard sufficed so long as the grandparent

overcame an evidentiary presumption in favor of the fit parent's wishes. *Id.* at 15-16.[1]

In sum, respondent's characterization of the split among the state courts as merely "semantic" (Opp. 11, 19) or "hollow" (Opp. 14) not only ignores the pervasive confusion among state courts that have "wrestled with the question of how to analyze their nonparental visitation statutes post-*Troxel*," *R.M.* v. *V.H.*, 2006 WL 1389864, *9 (Del. Fam. Ct. 2006), but also contradicts the very decision she defends and numerous decisions by other state courts of last resort.

B. Respondent Fails To Grasp The Important Qualitative Difference Between The "Harm" And "Best Interests" Standards

More fundamentally, respondent attempts to obscure the legal significance of adopting a "harm" versus a "best-interests" or other lesser standard. "Harm" to the child is not an "ambiguous" concept (Opp. 16) that may be supplanted by

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[1] Commentators also agree that post-*Troxel* confusion and division among the States regarding the proper legal standard to apply in grandparent visitation cases is pervasive and significant. See, *e.g.*, *Developments in the Law—Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 Harv. L. Rev. 2052, 2056 (2003) (arguing that "[t]he plurality opinion in *Troxel* * * * failed to deliver a clear, unambiguous standard under which to assess nonparental visitation statutes and has been the source of much confusion and debate"); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 Sup. Ct. Rev. 279, 313 (2000) (expressing concern that *Troxel*'s "in-between approach" provided too little guidance "to state and federal courts, charged with resolving the host of cases that *Troxel* [would] inspire"); Laurence C. Nolan, *Beyond* Troxel*: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 Drake L. Rev. 267, 267-68 (2002) (arguing that the "future of [grandparent visitation] orders is unsettled because the Court [in *Troxel*] did not decide whether a 'harm' standard or a 'best interest of the child' standard was the appropriate standard by which to weigh the constitutionality of grandparent visitation statutes").

choosing among a "kaleidoscope of different methods" (*id.* at 9) for evaluating grandparents' claims. The signal value of the harm requirement is that it establishes a qualitative legal standard—not a procedural or evidentiary barrier—that is distinct from the "best interests" test. That is, even if a court were to determine that grandparent visitation would be in the child's "best interests" (by whatever evidentiary standard), that does not answer whether the child would suffer "harm" without that visitation. Indeed, this Court has recognized the distinct and vital role a harm-based standard plays when parents' rights to rear their children are at issue. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 239 (1972) (justifying exemption from compulsory high school attendance based on lack of "harm to the physical or mental health" of Amish children); *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944) (concluding that "harmful possibilities[, including] psychological or physical injury," justified state restriction of certain child activities permitted by parents); *Meyer* v. *Nebraska*, 262 U.S. 390, 403 (1923) (invalidating state law prohibiting foreign-language education in elementary schools aimed at parents who wanted to educate their children in their native language because foreign language instruction was "not injurious to the health, morals or understanding of the ordinary child"); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925) (holding that States cannot restrict parents from sending their children to private schools in part because private education is "not inherently harmful").

Likewise, numerous state courts appreciate the qualitative significance of a harm standard. For example, when determining whether to restrict parents' right to determine their children's religious upbringing,[2] whether to grant

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[2] See, *e.g.*, *Jones* v. *Jones*, 832 N.E.2d 1057, 1059-61 (Ind. Ct. App. 2005); *Moore* v. *Moore*, 547 N.Y.S.2d 794, 794 (App. Div. 1989); *In re Marriage of Knighton*, 723 S.W.2d 274, 282-83 (Tex. Ct. App. 1987); *Kendall* v. *Kendall*, 687 N.E.2d 1228, 1232 (Mass. 1997); *Zummo* v. *Zummo*, 574 A.2d 1130, 1140 (Pa. Super Ct. 1990); *Khalsa*

custody to third parties rather than natural or adoptive parents,[3] and whether to deny visitation rights to noncustodial parents,[4] many state courts routinely apply a harm standard. Nor was "harm" too vague a standard for the thirteen States that have held the Fourteenth Amendment requires it in this specific context, see Pet.12-17; *Koshko*, 2007 WL 93237 (Md. Jan. 12, 2007), and none of the twelve States that have rejected a harm standard did so because of some perceived "ambiguity," see Pet. 17-19; *In re E.S.* v. *P.D.*, 2007 WL 470389 (N.Y. Feb. 15, 2007). What those courts *have* had difficulty understanding is whether a harm standard is constitutionally required for a court to overrule a fit parent's decision limiting visitation with his or her child. See *Troxel*, 530 U.S. at 69 (plurality opinion).

That certain circumstances considered in the "best interests" analysis have been cited as *potential* sources of harm (Opp. 11) is beside the point. Factors such as a "preexisting relationship of some significance between the grandparent and the child" (*id.* at 10) or the degree to which a child "would benefit from the continued opportunity to spend time with his maternal great-grandfather" (*id.* at 4) may, of course, be *relevant* to a harm analysis. But in the court

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v. *Khalsa*, 751 P.2d 715, 721 (N.M. Ct. App. 1988); *Hanson* v. *Hanson*, 404 N.W.2d 460, 463 (N.D. 1987).

[3] See, *e.g.*, *Locklin* v. *Duka*, 929 P.2d 930, 933 (Nev. 1997); *In re R.C.P.*, 57 S.W.3d 365, 377 (Mo. Ct. App. 2001); *In Interest of B.B.*, 559 So. 2d 1277, 1278 (Fla. Ct. App. 1990) (construing "'detriment' to mean circumstances which produce or are likely to produce mental, physical, or emotional harm of a lasting nature).

[4] See, *e.g.*, *In re Marriage of Gebhardt*, 783 P.2d 400, 405 (Mont. 1989); *Taraboletti* v. *Taraboletti*, 372 N.E.2d 155, 157 (Ill. Ct. App. 1978) (terminating visitation rights "where the physical and mental well being of the child has been endangered by the non-custodial parent's conduct"); *Iadicicco ex rel. Watkins* v. *Iadicicco*, 704 N.Y.S.2d 377, 378 (App. Div. 2000); *Mary D.* v. *Watt*, 438 S.E.2d 521, 529 (W.Va. 1992); *Tennessee* v. *Campbell*, 682 So. 2d 1274, 1279-80 (La. Ct. App. 1996).

below, as in all other States that do not require a specific finding of harm, such factors may be deemed *conclusive* as to whether the fit parent's wishes may be set aside, without any finding that harm is, in fact, likely to result. While respondent assumes that the fact that the same evidence is relevant under two legal standards somehow establishes that the two standards are not really different—or that the difference between them is insignificant—scores of this Court's cases show otherwise.[5] See, *e.g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 372-373 (2001) ("Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient [to prove discriminatory intent]." (citation omitted)). Harm and no-harm are distinct standards that, in application, can lead to opposite results and would do so in this very case, as Chief Justice Cappy's dissenting opinion below explicitly recognized (App. 49a-52a) and the majority opinion below did not deny.

C. Respondent Does Not Dispute That States Have Adopted Divergent Standards On An Important Federal Constitutional Question

Even if respondent were correct that the decisions do not fall neatly into two categories (*i.e.*, "harm" and "no-harm"), that would not alter the fact that the States are in utter disarray as to what the Constitution requires before a fit parent's wishes may be set aside. Respondent does not dispute (nor can she) that the twenty-two state high courts to have squarely

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[5] In fact, *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003), the leading case respondent discusses (Opp. 12) in support of her assertion that the conflict this case presents is "essentially semantic" (Opp. 11), itself expressly (i) recognizes the conflict—"[courts] have engaged in one of two modes of analysis," 827 A.2d at 218; (ii) notes that the conflict involves two qualitatively different legal standards, compare *ibid.* with *id.* at 219; and (iii) grounds the conflict in the state courts' confusion over what *Troxel* means, *id.* at 218 ("Courts across the country have wrestled with the issue of grandparent visitation * * * after *Troxel*.").

addressed grandparent visitation claims unambiguously grounded their rulings in the federal Constitution. Regardless of whether one sees the cases as presenting a "harm"–"best-interests" divide or subdivides them further, the disarray is of federal constitutional dimension. This is not an instance where States simply have made different choices as a matter of policy or practice (Opp. 14-16); this is a conflict among *courts* (whether among two camps or twenty) about what the federal Constitution requires.[6] That widespread confusion only underscores the need for this Court's review.

II. Providing States A Clear Legal Standard To Safeguard *Troxel*'s Fundamental Right Will Not "Constitutionalize" New Areas of Law Or "Enmesh" This Court In Case-By-Case Adjudication

Lacking a credible argument that no deep conflict exists, respondent resorts to vague claims that resolving the conflict this case presents risks "constitutionaliz[ing] the field of grandparent (perhaps even all third-party) visitation law" (Opp. 15) and "enmesh[ing] the Court in * * * case-by-case adjudication and line-drawing" (*id.* 16). Neither claim is credible.

Adopting a consistent legal standard to govern cases where a grandparent seeks custody against a fit parent's objection would not further "constitutionalize" child custody and visitation law. In *Troxel*, seven Justices concluded that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 68 (plurality opinion); see also *id.* at 77 (Souter,

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[6] Indeed, even those States that have legislated standards to govern grandparent visitation cases following *Troxel* have not done so based on policy judgments, but in order to remedy perceived federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006); Pet. 16-17.

J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Thus, contrary to respondent's assertion, "every grandparent visitation application" *already* "implicate[s] constitutional principles." Opp. 17. The state courts are confused and conflicted, however, about how those constitutional principles apply when a grandparent seeks custody or visitation against a fit parent's wishes. Deciding this case would not create any new constitutional rights, but would merely resolve substantial confusion about what the right recognized in *Troxel* requires.

Likewise, respondent's claim that this case would commit the Court to case-by-case adjudication of state domestic relations issues is exactly backwards. Without this Court's guidance, the States have been mired in line-drawing and adjudication over which combination of facets from respondent's "kaleidoscope" (Opp. 9) are constitutionally required. Adoption of a clear legal standard—particularly one that requires a showing of actual or potential harm to the child—would reduce, not invite, continued litigation between fit parents and grandparents. Far from threatening to "enmesh" federal courts in the intricacies of family law, this case presents an ideal vehicle for the Court to provide a clear and consistent legal framework for States to apply when the fundamental liberty interests of fit parents to raise their children are at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2007

FILED
FEB 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-863

IN THE
Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF OF AMICUS CURIAE FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* IN THIS CASE[1]

FAMILY RESEARCH COUNCIL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

SUMMARY OF ARGUMENT

FRC contends that respecting fit parents' child-rearing choices in the absence of actual harm to children is the only sure safeguard against the increasingly intrusive demands of the modern state to "micromanage" the American family. In a pluralistic society with government wielding great regulatory power, a more principled boundary than the "best-interests-of-the-child" standard must be interposed between the fundamental liberty of parents to direct the care and upbringing of their children, and non-constitutional claims by third parties contrary to the parents' choices. Absent clear and convincing evidence of compelling circumstances involving actual or potential harm to children, our Constitution should not tolerate government intrusion into the parent-child relationship for the purpose of the state evaluating parents' child-rearing decisions on the basis that it or third parties believe there to be "better" alternatives. FRC urges this Court to grant the Petition and clarify the limits on governmental intrusion into the family.

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[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE CONFUSION AMONG STATE COURTS ON WHAT STANDARDS ARE NECESSARY TO PROTECT PARENTAL RIGHTS UNDER *TROXEL* AND THE FOURTEENTH AMENDMENT

The Court should grant the Petition to clarify and reinforce that clear and convincing evidence of harm to children is the logically necessary threshold for state intrusion into the decisions of fit parents as to what is in their children's best interests.

The right of fit parents to direct their children's upbringing without state interference is one of the earliest recognized liberties protected by the Fourteenth Amendment, and should be zealously protected by this Court. Petitioner Shane Fausey has aptly identified the present lack of guidance from this Court on the scope of this time-honored liberty as a situation promoting confusion in the development of the law. *Petition* at 20. Our federal system traditionally commits a great degree of control over family law and other areas of law and regulation touching the family to the states and their courts. Yet, as the regulatory reach of the state steadily expands, states are grappling with the limits on their powers vis a vis the federally-protected fundamental rights of parents. *Amicus* FRC urges this Court to draw that line more definitely at the only location logically consistent with the fundamental nature of parents' rights: harm to the child.

For nearly 100 years, this Court has recognized and steadily guarded the fundamental liberty interest of parents in making decisions concerning their children's upbringing. Parental rights appear very early in this Court's enumerations of those liberties considered fundamental and therefore protected by the Fourteenth Amendment:

> While this court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). *See also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (a "basic civil right of man").

Indeed, in the case involving the specific legal concepts which now return for clarification, this Court described the fundamental right of a parent in the strongest terms, as "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). A parent's fundamental right necessarily includes decisions concerning visitation, custody, religious upbringing and who may associate with one's child. *Troxel*, 530 U.S. at 78-79 ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character") (Souter, J., concurring).

In *Troxel*, this Court struck down Washington's third-party visitation statute. The case involved grandparents,

whose son was deceased, petitioning for visitation with their grandchildren. The children's mother opposed the requested visitation. *Id.* at 61-62. In rejecting the grandparents' petition, the *Troxel* Court recognized that third-party visitation, even with a child's relatives, may unconstitutionally burden the parent-child relationship. *Id.* at 64. *Troxel* affirmed the fundamental nature of parents' Fourteenth Amendment liberty interest in directing the care and upbringing of their children, reiterating the constitutional necessity of the presumption that parents act in their children's best interests and that a court may substitute its decision for that of a child's fit parent only in very compelling circumstances. *Troxel* held:

> [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68. *Troxel* struck down Washington's visitation statute because the court failed to presume the validity of the mother's decision to deny the visitation and failed to give "special weight" to that decision. *Id.* at 67. This failure violated the mother's fundamental due process rights.

As Petitioner notes, however, *Troxel* posed and left unanswered the question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. Against the backdrop of this Court's long history of recognition of the fundamental rights of parents, the lack of such a bright-line threshold for state

interference with the exercise of such a venerable liberty interest stands out and demands correction.

This Court's deference to a fit parent harkens back to the days of Solomon. Tradition and experience have taught that the "natural bonds of affection" will lead fit parents to make the best decision concerning their child. *Troxel*, 530 U.S. at 68. As a Nation, we have come to trust that parents – not the state (or its courts) – are best at knowing and protecting their child's interest:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted).

More recently, this Court noted that the state has only a "*de minimis* interest" in a child's care when the child has a fit parent. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Reviewing the foundational principles underlying parental rights jurisprudence, this Court has emphasized protection of the natural rights and duties of parents toward their children against undue state interference:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago

> rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations" ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and citing 1W. Blackstone, COMMENTARIES 447; 2 J. Kent, COMMENTARIES ON AMERICAN LAW 190).

Indiscriminate use of the "best-interests-of-the-child" standard by courts called to review parental decisions is deeply inconsistent with this Court's parental rights decisions. The "best-interests-of-the-child" standard developed largely in the context of custody disputes *between* parents, a context which counsels caution before extending the standard into different kinds of disputes. Where the competing litigants both have constitutionally-protected parental rights, the court unavoidably must resolve a clash between differing views of what is best for the child, each of which is backed by a presumption that the parent is acting in the child's best interests. There is no alternative to the court breaking the tie, resolving the standoff, and protecting the interests of the child caught in the middle.

However, when courts cross-apply the "best-interests-of-the-child" standard to the much different context of a dispute

between a parent and a non-parent (even one with whom the child has a close relationship), they necessarily cross into the territory of the state potentially substituting its judgment for that of the only litigant holding a fundamental right to direct the child's upbringing. Legal scholars have noted that the "best-interests-of-the-child" standard fits the parent-versus-parent custody dispute context but is not well-suited outside it. *See, e.g.,* Jill Elaine Hasday, *The Canon of Family Law*, 57 STANFORD LAW REV. 825, 850 (2004). Without a bright line threshold forbidding judicial testing of parental decisions against the "best-interests-of-the-child" standard, except where there is clear and convincing evidence of potential harm to the child, there is no barrier to the standard devolving into the court paternalistically second-guessing parental wisdom on its own motion or on that of a non-parental third party.

Allowing courts to test the judgments of fit parents in disputes with non-parents under a "best-interests-of-the-child" standard where there is no showing of potential harm to the child is manifestly inconsistent with this Court's longstanding characterization of parents' rights as "fundamental." Indeed, the constitutional rights of parents ranked as a defining exemplar in one of this Court's hallmark cases on how fundamental rights are identified:

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes

> the rights to marry, to have children, [and] to direct the education and upbringing of one's children ....

Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997) (citations omitted).

As the *Glucksberg* decision explains, only those rights with the most ancient pedigree and most elemental connection to American liberty can be described as, and merit protection as, "fundamental":

> [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," []"so rooted in the traditions and conscience of our people as to be ranked as fundamental"[], and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."

Glucksberg, 521 U.S. at 720-721 (citations and quotations omitted).

Rights that are recognized as fundamental under the Due Process Clause are entitled to the highest protection against infringement:

> [T]he Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is

> provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Glucksberg, 507 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The *Troxel* Court did not answer the question of whether a showing of harm is a threshold requirement in the specific context of grandparent or third party visitation claims. Yet the plurality alluded to the harm threshold as a basic principle present in the Court's parental rights case law. *See Troxel*, 530 U.S. at 68-69 (normally no basis for state to question parent's child-rearing decisions so long as parent adequately cares for child).

This Court's parental rights decisions over the decades have generally identified harm to the child as the proper threshold between the parents' fundamental rights and the state's interest in protecting children. For instance, in the seminal parental rights case, *Meyer*, the Court noted:

> No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.

Meyer, 262 U.S. at 403. *See also Prince*, 321 U.S. at 167 ("the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

More recently, the Court has discussed at length the necessity for harm to the child to be respected as a limiting principle on the state's ability to interfere with parents' decisions regarding even matters with potentially very profound consequences on their children:

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition ... Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized ... [However,] simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.

Parham, 442 U.S. at 602-603 (citations omitted). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents ....").

Since the filing of the Petition in this case, one state high court has recognized the significance in this third party visitation context of this Court's long line of parental rights holdings. In *Koshko v. Haining*, 2007 WL 93237, *17 (Md., Jan. 12, 2007), the Maryland Court of Appeals concluded in a

lengthy and careful constitutional analysis that a threshold showing of parental unfitness or harm to the child is constitutionally compelled before a grandparent visitation claim can be weighed under the best interests standard. This conclusion necessitated the overruling of a substantial line of Maryland case law construing the state's grandparent visitation statute ("GVS"). *Id.* at *19.

In *Koshko*, the Maryland court found that for the GVS to be sufficiently narrowly tailored to satisfy the necessary strict scrutiny raised by such a direct and substantial infringement on the fundamental right of parents to direct the upbringing of their children, more was required than just the bare minimum some courts have thought sufficient to comport with *Troxel*:

> [T]he GVS permits a direct and substantial burden on the exercise of parental rights concerning the control of their children ... The parental presumption we engrafted onto the GVS saves it from *per se* invalidation under *Troxel*, but it is not sufficient, by itself, to preserve the constitutionality of the statute. Although the presumption elevates a Maryland court's decision above the "simple disagreement between the [trial court] and the [parents] concerning [their] children's best interests," disparaged by the Supreme Court in *Troxel*, it does not do enough to protect parents from undue interference with their rights. Fit parents, who are presumed to act in their children's best interests, nonetheless may be hailed into court to defend their decisions absent any showing that they are unfit and without any requirement that the grandparents challenging the parental

> decision plead any exceptional circumstances that may tend to override the parental presumption. A proceeding that may result in a court mandating that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes, no matter how temporary or modifiable, necessitates stronger protections of the parental right. The importance of parental autonomy is too great and our reluctance to interfere with the private matters of the family too foreboding, whether it be in matters of custody or visitation, to allow parental decision-making to remain that vulnerable to frustration by third parties.
>
> ...[I]f third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least prima facie evidence that the parents are either unfit or that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged. This scheme, applied to the visitation context, would supply the safeguards lacking to tailor suitably the GVS to the State's interests by ensuring that parental decisions entitled to deference are not unduly placed in jeopardy by less significant familial disputes.

Koshko, 2007 WL 93237, *17-18.

The Maryland Court of Appeals' decision in *Koshko* takes pains to harmonize the application of the best interests standard in the third-party visitation context with its well-developed use in the custody context. It is a model of careful balancing between the state's compelling interest in ensuring

the well-being of children and parents' fundamental rights recognized through the decades by this Court. *Id.*

In the wake of *Troxel*, states' views as to the dividing line between parents' Fourteenth Amendment fundamental rights to raise their children and the state's authority to intervene in those decisions can only charitably be described as quite divergent. *See Petition* at 11-20. FRC urges this Court to grant the Petition and answer the question left open in *Troxel,* by holding that a threshold showing of clear and convincing evidence of harm to the child is constitutionally compelled before a grandparent visitation claim contrary to a fit parent's decisions for his child may be weighed under the best interests standard.

CONCLUSION

Amicus FRC respectfully requests that this Court grant Shane Fausey's Petition for a Writ of Certiorari.

Respectfully submitted,

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February 21, 2007